89-228



No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

VOLKSWAGEN OF AMERICA, INC. AND
BELL PORSCHE AUDI-INC.,

*Petitioners,*

vs.

GERMAINE GIBBS, AMY GIBBS, LORI
GIBBS AND RAYMOND GIBBS,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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August 7, 1989

## QUESTIONS PRESENTED

1. Whether a punitive damages award violates petitioners' due process rights under the fourteenth amendment of the United States Constitution where the jury was charged to apply the minimal "preponderance of the evidence" burden of proof, and not the "clear and convincing evidence" standard requested by petitioners.

2. Whether the denial of petitioners' request for bifurcation, and the resulting simultaneous consideration of punitive liability intertwined with non-punitive issues, resulted in juror confusion and caprice and violated petitioners' constitutional rights to due process of law.

## LIST OF PARTIES AND RULE 28.1 LIST

The caption set forth on the cover page to this Petition identifies all of the named parties to this proceeding with the exception of defendants Sylvia Horowitz and Harold Horowitz, who have paid their portion of the judgment to plaintiffs-respondents without appeal.

Pursuant to Rule 28.1, the parent company of petitioner Volkswagen of America, Inc., is Volkswagenwerk, A.G., a West German corporation. Volkswagen of America, Inc. subsidiaries include Negov of Hawaii, Inc., Negov of Oregon, Inc., Pertech Computer Corp., VW Credit, Inc., Volkswagen South, Inc., Stone Mountain Volkswagen, Inc., Westmoreland Pipe Line Corp., and Volkswagen Lease Finance Corp.—a subsidiary of VW Credit, Inc.

Petitioner Bell Porsche-Audi, Inc. has no parent companies, subsidiaries or affiliates.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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The petitioners, Volkswagen of America, Inc. and Bell Porsche-Audi, Inc., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in the above entitled proceeding on February 8, 1989.[1]

[1] Because the Supreme Court of New Jersey denied petitioners' Petition for Certification and simultaneously dismissed petitioners' appeal, it is petitioners' understanding that the Writ of Certiorari should issue to the Superior Court of New Jersey, Appellate Division, as the last court to consider the merits of this action.

## OPINIONS BELOW

The Order of the Supreme Court of New Jersey denying petitioners' Petition for Certification and dismissing petitioners' appeal entered May 10, 1989 has not been reported. It is reprinted in the Appendix hereto, p.1a, *infra.*

The memorandum decision of the Superior Court of New Jersey, Appellate Division, entered on February 8, 1989 (per curiam), has not been reported. It is reprinted in the Appendix hereto, p.3a, *infra.*

The decision of the Superior Court of New Jersey, Law Division on March 14, 1988, entering Judgment notwithstanding the verdict on punitive damages (Honorable G. Donald McKenzie), has not been reported. It is reprinted in the Appendix hereto, p. 27a, *infra.*

The decisions of the Superior Court of New Jersey, Law Division entered on February 29, 1988 and March 11, 1988 (Honorable G. Donald McKenzie), have not been reported. They are reprinted in the Appendix hereto, p. 16a, *infra,* and p. 22a, *infra.*

## JURISDICTION

The decision of the Supreme Court of New Jersey denying petitioners' Petition for Certification and dismissing petitioners' appeal was entered on May 10, 1989. This petition for certiorari was filed within 90 days of that date. Each of the federal constitutional questions presented in this petition were properly raised in the New Jersey courts below and each is therefore within this Court's jurisdiction under 28 U.S.C. 1257(3).[2]

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[2] Pursuant to Supreme Court Rule 28.4(c), because this petition places in question the constitutionality of a portion of the New Jersey Products Liability Law, N.J. Stat. Ann. § 2A:58C-5(a) (West 1987), 28 U.S.C. 2403(b) may be applicable and the Attorney General of the State of New Jersey will accordingly be served a copy of this petition.

## CONSTITUTIONAL PROVISION INVOLVED

1. The due process clause of the fourteenth amendment of the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## STATUTE INVOLVED

1. N.J. Stat. Ann. § 2A:58C-5(a) (West 1987) provides:

> Punitive damages may be awarded to the claimant only if the claimant proves, by a preponderance of the evidence, that the harm suffered was the result of the product manufacturer's or seller's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of the product users, consumers, or others who foreseeably might be harmed by the product . . . .

## STATEMENT OF THE CASE

### A. Statement of Facts

This case challenges a jury verdict which included a $100,000 punitive damages award imposed to punish petitioner Volkswagen of America, Inc. ("VWoA") in a case in which it was alleged that VWoA made an inadequate effort to remedy an unexplained phenomenon allegedly associated with its Audi 5000 vehicle known as "unintended acceleration". Petitioners challenge the verdict and the quasi-criminal punitive damages award because of the trial court's failure to utilize the more stringent "clear and convincing" burden of proof on the issue of punitive liability, and the court's failure to bifurcate the punitive and liability aspects of the case for trial.[3] These decisions

[3] Petitioners also challenge the jury's findings of defect and liability to the extent these determinations were made in an unbifurcated proceeding, and thus were tainted by prejudicial evidence relating solely to punitive damages.

by the trial court were affirmed by the Superior Court of New Jersey, Appellate Division. The Supreme Court of New Jersey denied petitioners' request for Certification and dismissed petitioners' appeal. Petitioners submit that the procedural deficiencies surrounding the trial below violate the due process clause of the fourteenth amendment of the United States Constitution, and accordingly a writ of certiorari should issue.

This case arose from a single vehicle accident which occurred on September 23, 1983, in which a 1979 Audi 5000 S operated by defendant Harold Horowitz allegedly accelerated out of control and impacted with the respondents Gibbs' basement apartment. After a trial, the jury found petitioner VWoA, the distributor of the Audi 5000 vehicle in the United States, eighty percent (80%) responsible for the injuries sustained by respondents Gibbs. Defendant Horowitz was found to be twenty percent (20%) responsible. The jury awarded compensatory damages of $14,000 and imposed punitive damages of $100,000 against petitioner VWoA.

The trial court, sua sponte, immediately set aside the punitive damages verdict and entered a judgment notwithstanding the verdict. The trial judge determined that the evidence illustrated that VWoA worked in full cooperation with the National Highway Traffic Safety Administration ("NHTSA") which had initiated an investigation into the "unintended acceleration" phenomenon,[4] conducted several voluntary recall campaigns, and took significant and costly measures to assure that the Audi 5000 vehicle was as safe as reasonably practicable. The trial court noted: "I do not believe

[4] Subsequent to the trial of this matter, the NHTSA concluded its exhaustive investigation with a finding that no safety related defect within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966 existed in the Audi 5000 vehicle, and that no further action was necessary. This conclusion is similar to the findings made by the governments of Canada and Japan. *See* Investigative Report, "Alleged Sudden Unwanted Vehicle Acceleration, 1978 through 1986 Audi 5000 Passenger Cars Imported by Volkswagen of America, Incorporated", ODI Case No. C86-01 (Office of Defects Investigation Enforcement, National Highway Traffic Safety Administration, July 1989).

a reasonable jury could find that Volkswagen did not move on this problem and tried to ascertain the cause and correct it." App. F at 28a. The trial court also correctly noted that no cause for unintended acceleration had yet been identified by any governmental agency or automotive expert. App. F at 28a.

On February 8, 1989, the Superior Court of New Jersey, Appellate Division, affirmed the jury's liability verdict against petitioners and reversed the trial court's decision to enter a judgment notwithstanding the verdict on the issue of punitive damages. Although the appellate court specifically noted that the "evidence to support punitive damages was not overwhelming", it nevertheless reinstated the quasi-criminal award. App. C at 11a. The appellate division's opinion focused primarily on the evidence allegedly supporting the imposition of punitive liability. It virtually ignored the procedural deficiencies raised by petitioners. In addition, the appellate division denied petitioners' motion for reconsideration which specifically raised several federal constitutional questions, including those raised herein. App. C at 2a. The Supreme Court of New Jersey denied petitioners' Petition for Certification and dismissed petitioners' appeal. App. A at 1a.

**B. Presentation of the Federal Questions**

Because the New Jersey courts rejected, without any significant discussion, the federal questions presented herein, petitioners acknowledge their burden to demonstrate that these questions were properly presented to those courts and that they are therefore within this Court's jurisdiction under 28 U.S.C. § 1257(3).

**1. Presentation of the Federal Due Process Challenge to the Imposition of Punitive Damages and the Need for the Use of a "Clear and Convincing" Burden of Proof.**

Petitioners filed a motion for partial summary judgment in the trial court requesting that the punitive damages claim against VWoA be dismissed. In the context of that motion, petitioners specifically requested that the trial court utilize a

"clear and convincing" burden of proof to determine whether punitive damages should be dismissed as a matter of law. App. D at 19a. Petitioners additionally argued that the "preponderance of the evidence" burden of proof included in the recently enacted New Jersey Products Liability Act, N.J. Stat. Ann. § 2A:58C-5(a) (West 1987) should be held to be unconstitutional if that portion of the statute was deemed to be applicable to this case.

During trial, petitioners requested that a clear and convincing burden of proof be utilized by the jury in its' deliberations. A proposed jury charge was submitted to the trial court which specifically included a charge which incorporated the clear and convincing burden of proof. App. G at 38a.

The trial court consistently denied petitioners' requests for the use of the more stringent clear and convincing standard, and followed the New Jersey Supreme Court's decision in *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673, 512 A.2d 466 (1986), which tolerated the use of a preponderance of the evidence burden of proof when determining punitive liability. Although in *Fischer* the New Jersey Supreme Court noted that the arguments supporting a "clear and convincing" standard were "persuasive," it refused to reach the issue.[5]

Because the trial court dismissed the punitive damages award and entered a judgment notwithstanding the verdict, petitioners had no occassion specifically to raise the issue of proof by clear and convincing evidence in the superior court, appellate division in the first instance. After the appellate division reinstated the punitive damages award and reversed the trial court's judgment notwithstanding the verdict, petitioners immediately filed a motion for reconsideration which specif-

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[5] Thereafter, in 1987, the New Jersey Legislature adopted the minimal preponderance of the evidence burden of proof on the issue of punitive damages in product liability cases. N.J. Stat. Ann. § 2A:58C-5(a). To the extent the statute, which was signed into law on July 23, 1987, omits the use of a clear and convincing burden of proof, it conflicts with the due process protections to which petitioners are entitled, and must be declared unconstitutional by this Court.

ically raised the federal constitutional implications of the award of punitive damages on the appellate level. The motion for reconsideration was denied by the appellate division without opinion. App. B at 2a.

The need for the use of a more stringent clear and convincing burden of proof was again raised in the Petition for Certification to the New Jersey Supreme Court, and as part of petitioners' Notice of Appeal. The New Jersey Supreme Court denied certification and simultaneously dismissed petitioners' appeal without opinion. App. A at 1a.

**2. Presentation of the Federal Due Process Challenge Regarding Bifurcation of the Punitive Aspects of the Case.**

Prior to trial, petitioners requested that grossly prejudicial evidence offered to support plaintiffs' punitive damages claim be bifurcated from the liability aspects of the trial and deferred until after liability had been determined. This motion was denied by the trial court despite the recent enactment of the New Jersey Product Liability Act which mandated the procedural protection of bifurcation.[6] N.J. Stat. Ann. § 2A:58C-5(b). App. D at 20a-21a. During the trial, petitioners requested that the jury be directed to consider the issue of punitive damages only if and after liability was in fact determined. Petitioners also requested that the court bifurcate the summations of counsel and allow summations on the issue of liability only in the first instance. App. E at 25a. Again, the trial court refused to grant petitioners' requests for bifurcation. App. E at 26a.

These errors by the trial court and the resulting denial of petitioners' due process rights were raised in the appellate division. The appellate court, however, ignored the bifurcation issue altogether in its opinion, and thus never considered the federal constitutional questions presented.

Petitioners raised the bifurcation issue again as part of their Petition for Certification to the New Jersey Supreme Court. Certification was denied by the New Jersey Supreme Court without opinion, and petitioners' appeal was dismissed. App. A at 1a.

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[6] *See* Point II *infra.*

## REASONS FOR GRANTING THE WRIT

This case is another example of cases recently decided by this Court in which substantial constitutional challenges to punitive damages awards have been presented. This case presents a most egregious example of the imposition of a severe quasi-criminal punishment without any procedural due process or protection. This Court's warnings regarding the "important" constitutional implications surrounding the imposition of punitive damages liability, first articulated in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), and recently reiterated in *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 108 S. Ct. 1645 (1988), and *Browning Ferris Indus. of Vermont v. Kelco Disposal Inc.,* 109 S. Ct. 2909, 57 U.S.L.W. 4985 (1989), have gone and continue to go unheeded by state courts and legislatures. *See, e.g.,* The New Jersey Products Liability Law, N.J. Stat. Ann. § 2A:58C-5(a) (West 1987). This unfortunate situation must be remedied by this Court.

The implications of punitive damage awards have prompted this Court to invite a challenge to such awards under the due process clause of the fourteenth amendment. *Browning Ferris Industries,* 57 U.S.L.W. at 4990; *see also Bankers Life,* 108 S. Ct. at 1654-1656 (O'Connor, J., concurring). It is respectfully submitted that this case is the appropriate vehicle for this Court to rule that due process mandates additional procedural protections before punitive liability is imposed.

### I.

### THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES THE USE OF A CLEAR AND CONVINCING BURDEN OF PROOF BEFORE PUNITIVE DAMAGES ARE IMPOSED.

The concept of punitive damages contemplates a civilly imposed penalty against a defendant in money or in property, primarily to deter him from engaging in similar conduct or to punish him for the activity complained of. *See Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). Punitive damage awards can take the form of fines, forfeiture of property, or sums awarded to private litigants pursuant to specific statutory

schemes or common law doctrines. The imposition of punitive damages embodies quasi-criminal penalties because the jury is asked to determine whether a defendant has committed wrongdoing which is "intentional and deliberate and which has the character of outrage frequently associated with crime." *Westfield Center Service, Inc.* v. *City Service Oil Corp.*, 158 N.J. Super. 455, 486-87 (Ch. Div. 1978), *aff'd*, 86 N.J. 453 (1981). Although punitive damages serve the same function as criminal penalties, punishment and deterrence, the procedural protections afforded a criminal defendant under the due process clause of the fourteenth amendment are noticeably absent.

The due process clauses of the federal Constitution prohibit governments from depriving any person "of life, liberty, or property, without due process of law." *U.S. Const. Amend. V; Amend. XIV; See also N.J. Const. Art. 1; see Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The due process clause protects "civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances". *Logan* v. *Zimmerman Brust Co.*, 455 U.S. 422, 429 (1982); *see also Bankers Life & Casualty Co.*, 108 S. Ct. at 1654-1656 (O'Connor, J., concurring); *Browning-Ferris*, 57 U.S.L.W. at 4991-4992 (Brennan, J., concurring).

In order to satisfy due process requirements, a defendant must be afforded every procedural and substantive protection before the jury can be asked to consider the imposition of the quasi-criminal remedy of punitive damages. The "stigma" attached to any punitive damage award arising out of supposedly malicious or evil-minded conduct warrants nothing less. *See, e.g., Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 458 (1980) ("The issue of whether the defendant acted maliciously or in willful or reckless disregard of the plaintiff's rights, justifying recovery of punitive damages, falls within the 'certain classes of acts' for which a stigma attaches and is a more serious allegation that the ordinary factual issue in a personal injury action.").

This Court has already determined that the imposition of a stigma warrants the extention of more rigorous procedural protection. In the case of *In re Winship,* 397 U.S. 358 (1970), this Court pointed to the "certainty that [the defendant] would be stigmatized by the conviction" and the probability that he might lose his "good name", in determining that a greater level of procedural protection—i.e., a requirement that the State prove its case beyond a reasonable doubt—is required in criminal cases. *Id.* at 363-364. Similarly, in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), this Court stated that in a civil proceeding in which "the state attached 'a badge of infamy' to the citizen, due process comes into play." This Court defined a "badge of infamy" as that which puts a "person's good name, reputation, honor or integrity. . .at stake because of what the government is doing to him." *Id.* at 437; *see also* Wheeler, *The Constitutional Case For Reforming Punitive Damage Procedures,* 69 Va. L. Rev. 269, 281 (1983); *Addington* v. *Texas,* 441 U.S. 418, 432-433 (1979) (The defendant could be stigmatized by a ruling compelling civil commitment, and accordingly due process required the use of a clear and convincing standard of proof). To protect particularly important individual interests, and to avoid the imposition of an erroneous judgment affecting those interests, this Court has long mandated the use of a clear and convincing standard of proof. *See, e.g., Woodby* v. *INS,* 385 U.S. 276 (1966) (deportation proceeding); *Santosky* v. *Kramer,* 455 U.S. 745 (1982) (termination of parental rights).

This Court has prescribed a three part test for determining the level of procedural protection required by the due process clause of the federal Constitution. In *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), this Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335 (citation omitted). This Court further articulated the first factor of the *Mathews* due process test by stating:

> [T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any . . . decision making process.

*Id.* at 341.

Examining this test in the punitive damage context, it becomes clear that additional procedural protections are mandated by the due process clause. First, because punitive damages offer extraordinary monetary relief, the magnitude of the potential deprivation that may be created by their imposition is obvious. Additionally, as noted *supra,* an adverse punitive judgment permanently and severely stigmatizes the defendant, and damages the corporate defendant's reputation and integrity. As the Honorable H. Lee Sarokin recently observed in *Juzwin* v. *Amtorg Trading Corp.,* 705 F. Supp. 1053 (D.N.J. 1989):

> Although the penalty imposed in a civil matter may far exceed that provided for under a criminal statute for the same conduct, none of the same safeguards are provided. The standard of proof for the imposition of such penalties is lesser in civil matters, even though the exposure may be far greater.

*Id.* at 1055.

Second, as noted in *Mathews,* the risk of an erroneous deprivation of the defendant's property must be considered. In *Santosky,* this Court held that due process requires proof by clear and convincing evidence before parental rights may be terminated. 455 U.S. at 747-48. In so holding, the Court

explained the application of the second prong of the *Mathews* test when selecting an appropriate standard of proof:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication . . . . [T]he minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.
>
> * * *
>
> Under [the second prong of] *Mathews* v. *Eldridge* . . . the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

*Id.* at 754-55, 761 (citations omitted; quoting *Addington* v. *Texas,* 441 U.S. 418, 423 (1979)); *see also Herman & McClean* v. *Huddleston,* 459 U.S. 375, 390 (1983).

A preponderance of the evidence standard of proof does not fairly allocate the risk of an erroneous factfinding between parties to a punitive damages case. As this Court has recognized, a preponderance standard reflects "a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' " *Id.* at 755 (quoting *Addington,* 441 U.S. at 423). Such an equal sharing of the risk is completely inappropriate in punitive damages cases.

In punitive damages cases, no hardship befalls the plaintiff should the jury decline to award punitive damages. Having already been made whole by the award of compensatory damages, the plaintiff stands only to gain a windfall through any punitive award. *See Juzwin,* 705 F. Supp. at 1055. If he loses, he still leaves the courtroom having been compensated

for his injuries. The defendant, on the other hand, stands to lose not only an undefined, uncontrolled amount of money, but more importantly its good name, having been stigmatized as a corporation that is "malicious" or "wantonly reckless" concerning the safety of its customers. Thus, because the risk of error falls so disproportionately heavier upon the defendant, the *Mathews/Santosky* test requires a correspondingly more stringent burden of proof.

Finally, under the third *Mathews* criteria, it is uncontroverted that the use of a clear and convincing burden of proof imposes no burden whatsoever on the judicial system. Any minor procedural inconvenience that is caused by the imposition of the clear and convincing standard is completely outweighed when contrasted with the fundamental rights that it is designed to protect consistent with constitutional due process.

Because the express goals for punitive damages are identical to those of the criminal law[7]—punishment and deterrence—the jury must be impressed that its fact-finding exercise is both different from, and more devastating than, the typical determinations in a civil case. The similarity between civil punitive damages and the criminal law has prompted several respected commentators to conclude that punitive damages issues must be afforded the full constitutional safeguards of criminal procedure, including the protection offered by a higher standard of proof. *See* Long, *Punitive Damages: An Unsettled Doctrine,* 28 Drake L. Rev. 870, 885 n.7 (1976); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 Va. L. Rev. 269 (1983); Grass, *The Penal Dimensions of Punitive Damages,* 12 Hastings Const. L.Q. 241 (1985). The State of Colorado follows this reasoning and requires proof "beyond a reasonable doubt" before punitive damages can be imposed. *Mince* v. *Butters,* 616 P.2d 127, 129 (Colo. 1980).

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[7] The criminal nature of punitive damages prompted Justice O'Connor in *Browning Ferris* to quote an observation of Lord Devlin in *Rooke v. Barnard,* [1964] A.C. 1129: "Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal." 57 U.S.L.W. at 4995.

Several state courts have held that punitive damages must be proven by clear and convincing evidence. *Linthicum* v. *Nationwide Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 680-681 (1986); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Travelers Indem. Co. v. Armstrong*, 442 N.E. 2d 349, 362-363 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 457-458 (1980); *See also Raynor v. Richardson Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986); *Deshmukh v. Cook*, 630 F. Supp. 956, 961 (S.D.N.Y. 1986) (convincing proof of sufficient facts); *Roginsky v. Richardson Merrell, Inc.*, 378 F.2d 832, 850-851 (2d Cir. 1967) (applying New York law). In addition, numerous states have enacted statutes providing for proof of punitive liability by clear and convincing evidence.[8] Although courts and legislatures are finally realizing the need for greater procedural protection, many states, including New Jersey, refuse to follow the more enlightened view.

The more stringent clear and convincing burden of proof was utilized by the trial court in *Browning Ferris*, 57 U.S.L.W. at 4987. Despite this additional procedural protection, Justices Brennan and Marshall criticized the jury instruction in *Browning Ferris*, stating that it provided only "skeletal guidance" to the jury. Justice Brennan noted:

> . . . punitive damages are imposed by juries guided by little more than an admonition to do what they think

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[8] *See, e.g.*, Ala. Code § 6-11-20(a) (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Civ. Code § 3294(a) (Deering Supp. 1989); Fla. Stat. Ann. § 768.73 (West 1987) (when punitive award exceeds three times compensatory award); Ga. Code Ann. § 51-12-5.1(b) (Supp. 1988); Ind. Code Ann. § 344-34-2 (West Supp. 1988); Iowa Code Ann. § 668A.1 (West 1987); Kan. Stat. Ann. § 60-3701(c) (1988); Ky. Rev. Stat. Ann. § 411.184(f)(2) (Baldwin 1988); Minn. Stat. Ann. § 549.20 (West Supp. 1988); Mont. Code Ann. § 27-1-221(5) (1987); Ohio Rev. Code Ann. § 2307.80 (A) (Anderson Supp. 1989) (for products liability actions); Okla. Stat. Ann. tit. 23, § 9 (West 1987) (clear and convincing evidence required if punitive award exceeds compensatory award); Or. Rev. Stat. § 30.925 (1988) (for products liability actions); Or. Rev. Stat § 41.315(1) (1987); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1 (Supp. 1989).

> is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Daniels* v. *Williams,* 474 U.S. 327, 331 (1986), *quoting Dent* v. *West Virginia,* 129 U.S. 114, 123 (1889), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

*Id.* at 4992. Justice O'Connor similarly noted the "vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.; see also Bankers Life,* 108 S. Ct. at 1655 ("[T]here is reason to think that [punitive awards allowing jury discretion] may violate the due process clause.").

In light of the appellate division's recognition in this case that the evidence tending to support punitive damages was "not overwhelming", and the trial court's determination that the evidence failed to even meet the minimal preponderance of the evidence standard, it is highly likely that the use of the more rigorous clear and convincing burden of proof would have resulted in a finding of no punitive liability against petitioner in this case. Due process mandates such a result.

The significance of the procedural due process deficiencies in the procedures surrounding awards of punitive damages prompted Justices Brennan and Marshall, although concurring in this Court's opinion in *Browning Ferris,* to make certain the majority's decision "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 57 U.S.L.W. at 4991. It is respectfully submitted that this is the appropriate case for this Court to consider this most important constitutional issue.

Only this Court can impose constitutional order in a governmentally sponsored system of punishment in which punitive damages are awarded in a commonplace manner at an

alarmingly increasing frequency. This Court must take this opportunity to remedy a constitutionally defective system of providing only the most minimal procedural safeguards to defendants who face punitive liability. For the foregoing reasons, it is respectfully requested that certiorari be granted.[9]

## II.

## THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES THAT PUNITIVE DAMAGES PROCEEDINGS BE BIFURCATED FROM THE LIABILITY PORTION OF A CASE

The additional protection of bifurcation should be mandated by this Court in order to provide defendants with necessary constitutional due process in punitive damages cases where jury confusion and caprice is likely to occur. By "bifurcation" petitioners mean, at a minimum, separate jury instructions, separate summations and separate jury deliberations on the issues of liability and punitive damages. In addition, where certain evidence is relevant only to the punitive damage inquiry and not to liability issues, as is the case in a strict products liability action, bifurcation of the evidence via separate trials to the same jury is necessary. Only in this way can a court prevent the jury's inquiry regarding punitive damages from confusing and prejudicing the jury's inquiry on the liability issues. In addition, the separation of the punitive damages issue from the liability case will cause the jury to focus upon the serious nature of punitive damages and the important difference between punitive and compensatory damages.[10]

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[9] The issue whether due process requires the use of a "clear and convincing" burden of proof in punitive damages actions is presently pending before this Court in *Great Republic Insurance Co. v. Cheval,* No. 88-1784 (Petition for Writ of Certiorari filed on May 3, 1989).

[10] In fact, prior to the time of trial, the New Jersey Legislature recognized the need for additional procedural protection in punitive damages cases, and enacted a statute which required bifurcation of the punitive issue in products liability case. *See* N.J. Stat. Ann. § 2A:58C-5(b) (West 1987). Although this statute provides that it "shall take effect immediately", the trial court refused to apply the statute and the New Jersey appellate courts refused to disturb the trial court's decision. The state courts' arbitrary refusal to apply a clearly applicable statute designed to grant procedural protection to petitioners

By intertwining the liability and punitive aspects of the case, it becomes extraordinarily difficult, if not impossible, for the jury to separate out the vastly *different nature* of the inquiry regarding punitive damages, as distinguished from the deliberations focused on liability. The liability case against petitioners herein was purely a strict products liability claim. Thus, on the issue of liability only, the reasonableness of petitioners' conduct was totally irrelevant. The evidence presented to the jury during trial regarding petitioners' "conduct" thus unfairly allowed the jury to consider the nature of petitioners' actions when it should have been focused solely on the mechanical issues of product defect and causation.

In addition, during trial and in his closing argument, plaintiffs' counsel focused entirely on the punitive aspect of the case, including petitioners' alleged failure to act in a timely manner, thereby improperly misdirecting the jury to analyze the petitioners' "conduct" rather than the product analysis properly utilized in a strict liability setting. Under these circumstances, the trial should have been bifurcated to avoid the possibility of jury confusion and prejudice. *See Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., Berger, C.J., Powell, J., dissenting) ("punitive damages are frequently based upon the caprice and prejudice of jurors.").[11]

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(Footnote continued from preceding page)
represents a separate denial of due process of law. It has been held that the arbitrary failure to adhere to procedures mandated by statute or rule when adjudicating property or liberty interests constitutes a denial of due process of law under the federal Constitution. *See, e.g., Mabey v. Regan,* 537 F.2d 1036, 1042 (9th Cir. 1976); *Jacobs v. College of William & Mary,* 495 F. Supp. 183, 188 (E.D. Va. 1980), *aff'd,* 661 F.2d 922 (4th Cir. 1981), *cert. denied,* 454 U.S. 1033; *United States v. Caceres,* 440 U.S. 741, 747 (1979) (Marshall, J., dissenting); *D'Iorio v. County of Delaware,* 447 F. Supp. 229, 24041 (E.D. Pa.), *vacated on other grounds,* 592 F.2d 681 (3rd Cir. 1978).

[11] The jury's confusion in this case is evidenced by the fact that the jury found by a five to one (5-1) vote that there was a "defect" in the Audi 5000 vehicle, and that the "defect" was the proximate cause of the accident. The jury determined by a six to zero (6-0) margin, however, that punitive damages were warranted against petitioners. This result is clearly and utterly inconsistent, and is indicative of jury confusion or prejudice. Bifurcation of the proceedings clearly would have helped to alleviate this confusion and would have focused the jury upon the different inquiry that must be made when determining punitive liability.

The high likelihood of juror confusion and prejudice has prompted a number of states to enact statutes which require punitive damages cases to be bifurcated to varying degrees. *See, e.g.,* N.J. Stat. Ann. § 2A:58C-5(b) (West 1987) (requires separate proceeding to determine whether punitive damages are to be awarded); Mo. Ann. Stat. 510.263(b) (Vernon Supp. 1989) (requires bifurcated trial if requested by any party); Okla. Stat. Ann. tit. 23 § 9 (West 1987) (separate hearing required); Idaho Code § 6-1604(2) (Supp 1989) (separate hearing required); Minn. Stat. Ann. § 549.191 (West 1988) (separate hearing required); Utah Code Ann. § 78-18-1(2) (Supp. 1989) (evidence of a party's financial condition admissible only after a finding of liability for punitive damages has been made); Md. Cts. & Jud. Proc. Code Ann. § 10-913(a) (1984) (same); Kan. Stat. Ann. § 60-3701(a) (Supp. 1988) (same); Mont. Code Ann. § 27-1-221(7)(a) (1987) (same).

Petitioners respectfully submit that the decision whether to afford defendants in punitive damages cases the valuable procedural safeguard of bifurcation cannot and should not be left to the unguided discretion of individual legislatures or courts. Punitive damages are generally awarded by juries who are given little or no guidelines and unbridled discretion. A defendant who is subjected to this alarmingly arbitrary quasi-criminal system is certainly entitled to at least the simple procedural fairness created by bifurcation. In the absence of bifurcation and a heightened burden of proof, defendants will continue to incur quasi-criminal penalties imposed by jurors with unfettered discretion operating in a system which fails to focus the jury's attention upon the seriousness of their task.

## CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the time has come for this Court to resolve the substantial due process issues raised by the imposition of punitive damages without proper procedural protection. It is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: August 7, 1989

**Appendix A—Order of the Supreme Court of New Jersey, filed May 10, 1989**

**SUPREME COURT OF NEW JERSEY**
**C-964 September Term 1988**

30,191

GERMAINE GIBBS, *et al.*,
*Plaintiffs-Respondents,*
*vs.*
HAROLD HOROWITZ,
*Defendant,*
*and*
VOLKSWAGEN OF AMERICA INC., *et al.*,
*Defendants-Petitioners.*

ON PETITION FOR CERTIFICATION

FILED

MAY 10, 1989

STEPHEN W. TOWNSEND
CLERK

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-4455-87T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the notice of appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day of May, 1989.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

**Appendix B—Order of the Superior Court of New Jersey Appellate Division, filed March 3, 1989**

## ORDER ON MOTION

GERMAINE GIBBS ET AL

*vs*

HAROLD HOROWITZ ET AL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4455-87T5
MOTION NO. M-3184-88
BEFORE PART: C
JUDGE(S): PETRELLA
GRUCCIO
LANDAU

Motion Filed: February 21, 1989
Answer(s) Filed:_____ By:_____
_____ By:_____
_____ By:_____
_____ By:_____
Submitted to Court: March 1, 1989

### ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 2nd DAY OF MARCH, 1989, HEREBY ORDERED AS FOLLOWS:

| MOTION BY APPELLANT FOR RECONSIDERATION | GRANTED | DENIED | OTHER |
|---|---|---|---|
| | | X | X |

**SUPPLEMENTAL:**

The opinion will be amended to replace the words "gas pedal," inadvertently used on page two of the slip opinion, with "brake pedal."

FILED
APPELLATE DIVISION
MAR 3 1989
R. E. CAMILLE COX
Acting Clerk

I hereby certify that the foregoing is a true copy of the original on file in my office.

R. E. CAMILLE COX
Acting Clerk

FOR THE COURT:

JAMES J. PETRELLA
JAMES J. PETRELLA P.J.A.D.

LAP

**Appendix C—Opinion of the Superior Court of New Jersey, Appellate Division, filed February 8, 1989**

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**
**A-4455-87T5**

GERMAINE GIBBS
*Plaintiff-Appellant and Cross-Respondent,*

and

AMY GIBBS, LORI GIBBS and RAYMOND GIBBS,
*Plaintiffs and Cross-Respondents,*

*v.*

VOLKSWAGEN OF AMERICA, INC. and BELL PORSCHE-AUDI, INC.
*Defendants-Respondents and Cross-Appellants,*

and

HAROLD HOROWITZ,
*Defendant.*

ORIGINAL FILED

Feb 8, 1989

Emille R. Cox, Esq.
Acting Clerk

Argued January 9, 1989—Decided February 8, 1989

Before Judges Petrella, Gruccio and Landau.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

James Hely argued the cause for appellant and cross-respondents.

John T. Dolan argued the cause for respondents and cross-appellants (Crummy, Del Deo, Dolan, Griffinger & Vecchione, attorneys; J. Dolan and Christine A. Amalfe on the brief).

PER CURIAM

*Appendix C*

This case arose from an accident on September 27, 1983, in which Harold Horowitz drove his wife's 1979 Audi 5000, which was purchased at Bell Porsche-Audi, Inc. (Bell), through a brick wall and into the living room of an apartment occupied by Germaine Gibbs (Germaine) and her three children, Amy, Lori and Raymond.

Horowitz claimed that he was driving forward into his garage when the car "shot forward," "out of control," across a vacant lot and into the Gibbs' apartment. He asserted that he applied the brakes but that the car went "faster and faster." Horowitz did not believe that he had inadvertently applied the accelerator instead of the brakes.

There was testimony that the brake and accelerator pedals in the Horowitz car were 44.5 millimeters apart, plus or minus 1.59 (manufacturer specifications require a gap of 50 millimeters, plus or minus 5); that the brake pedal was only 1¼ inches higher than the gas pedal; and that the gas pedal had poor traction because it was not curved.

The Gibbs sued for compensatory damages against Horowitz on a negligence theory and against Bell on a products liability theory. The counts against Volkswagen included requests for both compensatory and punitive damages arising out of products liability.[1] The claims against Horowitz have been resolved.

Accepting the Gibbs' theory of sudden unwanted acceleration due to a defective pedal configuration, the jury returned a verdict in favor of Germaine for $10,000 in compensatory damages and punitive damages of $100,000. Only Volkswagen was affected by the punitive damage verdict. The jury determined that Horowitz was 20% at fault, and assessed the fault of Volkswagen and Bell at 80%. Verdicts aggregating $5,000 were

[1] The pleadings established and the jury was charged that Volkswagen was the U.S. importer or marketer of Audi 5000s.

also made in favor of the three Gibbs children. Thereafter, the trial judge set aside the jury's punitive damage award to Germaine *sua sponte* and entered judgment notwithstanding the verdict under *R.* 4:40-2.

Germaine appeals from the decision which set aside the jury's punitive damage award and from the entry of the judgment notwithstanding the verdict. She urges that the trial court's decision to enter judgment notwithstanding the verdict was erroneous, as the jury verdict was supported by competent evidence. Volkswagen and Bell cross-appeal from the jury's determination on liability and from the consequent jury awards.

## ADEQUACY OF EVIDENCE TO SUPPORT PUNITIVE DAMAGE AWARD

Plaintiffs presented evidence that in 1978, the National Highway Traffic and Safety Administration (NHTSA) conducted a study regarding unwanted acceleration in General Motors (GM) vehicles. Entitled Engineering Analysis Action Report, the study concluded that "Sudden unwanted acceleration related accidents are pervasive throughout the passenger car population." The study stated "[i]nadvertent and unknowing driver application of the accelerator pedal when the driver intended to apply the brake appears to be the cause of many of the reported sudden acceleration related accidents, even though many of the drivers continue to believe that they had been pushing on the brake pedal." The study determined, however, that applying the brakes with moderate force would stop a GM car. This study was contrasted with later studies which demonstrated that the Audi 5000 was unique in that it "was possible to overlap the brake and accelerator pedals and to increase the speed of the engine while attempting to brake."

Plaintiffs introduced a November, 1981 letter from NHTSA to Volkswagen inquiring about sudden acceleration in their Audi 5000 vehicles. The letter prompted a January, 1982

meeting between NHTSA and Volkswagen as to possible causes of a high incidence of "runaway" accidents involving the Audi 5000. At the meeting, Volkswagen representatives indicated two possible causes. They claimed "that the major cause for such incidents is interference between a displaced floor mat and the antivibration mass attached underneath the accelerator pedal." They also stated "[a]n abnormally small gap between the accelerator and brake pedals, making inadvertent driver application of both pedals a possibility, may also have been involved in some incidents."

Shortly thereafter, in a formal position letter of April 14, 1982, Volkswagen asserted that a "review of all relevant information, data and considerations . . . led . . . to the conclusion that interference of floor mats or carpets with the accelerator pedal as well as erroneous application of brake and acceleration pedal are probable causes of unintended acceleration." Volkswagen said it would develop a modification to the gas pedal to prevent the floor mats from interfering with the gas pedal. As to inadvertent actuation of the acceleration, it stated that "causes are operator related and . . . there is no indication that the actual configuration of the pedal cluster was a contributing factor." Volkswagen agreed to alert customers "that in cases of unintended acceleration caused by driver error, a possibility to stop the car is to turn off the ignition." Thus, of the two possible causes, Volkswagen only sought to address by physical modification of the Audi 5000 the mat and carpet problem, as it deemed the other "operator related."

A recall, referred to in the April 14 letter (the "FN recall") was instituted to install a plate in each 5000 of appropriate vintage to prevent floor mat interference with the accelerator pedals. Volkswagen's Chief Field Engineer, Daniel Anderson, testified, and statistical data corroborated, that the FN recall had no effect on the problem.

The deposition of John Damoose, former Vice President of the Audi Division of Volkswagen, was also presented to the

jury. Damoose had testified as late as July 30, 1987, in an another matter, that Volkswagen's position continued to be that the sudden unwanted acceleration was caused by driver error. Confronted at that deposition with his press releases issued following the Volkswagen and NHTSA meeting which said that it was unfair to blame consumers for unwanted acceleration problems with the Audi 5000, he explained that those statements were made to show concern and to protect Volkswagen's public image, but that Volkswagen' position had not changed. His testimony also established that, as corroborated by company tests, sudden acceleration incidents in the Audi 5000 "were far in excess" of other vehicles.

The following internal documents were introduced: An August, 1979 memorandum from a Porsche-Audi representative to Volkswagen Headquarters, written after checking out a sudden acceleration accident, which stated that he "suspect[ed] that the customer operated the accelerator at the same time when applying the brakes, and thus the vehicle may have moved;" and a February, 1982 Volkswagen study of brake pedal/gas pedal clearances involving various models which they marketed. Clearance data regarding 1979 Audi 5000s, the same year and model as Horowitz was driving, were marketedly worse than other models.

The jury also had before it testimony from people who had similar acceleration problems with Audi 5000s and questionnaires completed by Volkswagen inspectors who looked into sudden acceleration incidents from May 1982 through May 1984. Each of these questionnaires indicated that the Volkswagen inspector believed the cause of the accidents was simultaneous actuation of the brake and gas pedals.

Additionally, when the jury heard excerpts from the deposition of Volkswagen's Chief Field Investigator, Anderson, they learned that he had been recommending that Audi 5000 drivers brake with their left feet to avoid this problem. Anderson admitted that simultaneous actuation could occur in all 1978 through 1983 Audi 5000 vehicles.

*Appendix C*

As the defendants later presented expert testimony "that the brakes of the Audi 5000 would overpower the accelerator if a driver inadvertently depressed both the brake and accelerator pedals at the same time," it is significant that Anderson indicated in an incident report dated September 28, 1982: "[Anderson] Suggested that she [the driver] may have applied both gas and brake pedal together—She [the driver] stated 'that's what I [the driver] probably did.' *I* [Anderson] *demonstrated how the vehicle would move under those conditions.*" Anderson had also estimated that unintended acceleration reports concerning the Audi 5000 were about 50 to 100 times that of Volkswagen vehicles.

An August 1983 NHTSA report entitled "Control Pedal Performance Evaluation Audi 5000" concluded that "[i]t was possible to overlap the brake and accelerator pedals and to increase the speed of the engine while attempting to activate the brakes." The NHTSA directed a letter to Volkswagen on August 12, 1983, saying:

> One situation which is not addressed by campaign FN is the possibility that the right portion of the driver's shoe may contact the accelerator pedal while depressing the brake pedal (pedal overlap). As you may recall, this was identified by Volkswagen of America (VW) during the meeting in our office on January 26, 1982, as the probable cause for a small percentage of the reported runaway incidents. Since then, Mr. Kammerbauer informed us that this was the most likely cause for the incident involving Mr. Rupp's Audi. Dr. Brand and Mr. Wolfangel were told by VW representatives that pedal overlap was the probable cause for their accidents. These complaints are enclosed. Personnel from the NHTSA Engineering Test Facility tested Mr. Wolfangel's 1982 Audi 5000 and a 1981 Audi 5000 whose owner had not reported a relevant problem. Both vehicles accelerated when the right portion of the brake pedal was depressed. When 24 domestic vehicles were tested in the same manner all of them remained stationary.

*Appendix C*

We have observed that many domestic vehicles with high mileage have brake pedal surfaces which are worn primarily on the far right portion. This indicates that many American drivers press on the right rather than the middle portion of the brake pedal. Based on preliminary information, it appears that driving habits which are utilized by a significant percentage of drivers, and which are harmless in most vehicles, may result in accidents in Audi 5000 vehicles. Unless the 2 Audis we tested are not representative of other similar vehicles, or you have factual information not currently known to us, it is strongly recommended that VW initiate a safety recall taking the necessary corrective action to preclude the possibility of undesired acceleration in all Audi 5000 vehicles when the driver steps on the brake pedal.

Our position concerning this matter should not be interpreted as indicating that we have concluded that the control pedal design was a factor in all of the reported accidents. On the contrary, it appears that an evaluation of possible cruise control system, throttle linkage, or engine surge problems is also advisable. However, further delay in correcting the pedal problem (which has been identified by VW and verified by NHTSA) is not justified merely because the possibility of one or more additional accelerator control system problems may exist. Timely action is needed since 6 reports involving 5 accidents have been received by NHTSA during the month of July. We will consider initiating a formal investigation if you do not intend to take positive action or do not provide factual information not currently known to us. Please inform us within 10 working days of VW's intentions concerning this matter.

Volkswagen's response letter, dated September 14, 1983, stated that Volkswagen would install a brake plate to increase the height differential between the gas and brake pedals. The letter asserts that Volkswagen was "confident that this modification [the "FR recall"] will prevent inadvertent activation of brake and gas pedals at the same time."

*Appendix C*

Plaintiffs introduced evidence which suggested that the FR recall dramatically reduced the number of incidents involving unwanted acceleration. Also before the jury was a Volkswagen letter to consumers dated September 9, 1987, which referred to the 5000's unwanted acceleration problem as a "mechanical shortcoming."

Finally, there was evidence that Volkswagen's regular Quality Assurance Department was not involved in investigating sudden unwanted acceleration in Audi 5000 cars, as the "Product Liaison Group" was created to handle the situation. Testimony indicated that the Product Liaison Group was part of Volkswagen's legal department.

Taking into consideration the foregoing evidence, we believe that the trial judge erred in setting aside the jury verdict on punitive damages. The standard for determining a motion for judgment notwithstanding verdict, requires that "the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied." *Pressler, Current N.J. Rules,* Comment *R.* 4:40-2 (Citing *Dolson* v. *Anastasia,* 55 *N.J.* 2, 5-6 (1969)). This standard has been characterized as "mechanical." *Id.*

Generally, punitive damages are available where a defendant's conduct is "especially egregious." *Leimgruber* v. *Claridge Associates, Ltd.,* 73 *N.J.* 450, 454 (1977). *See also Fisher* v. *Johns-Manville Corp.,* 103 *N.J.* 643, 654-655 (1986); *Nappe* v. *Anschelewicz, Barr, Ansell & Bonello,* 97 *N.J.* 37, 48-49 (1984); *Berg* v. *Reaction Motors Div.,* 37 *N.J.* 396, 413-414 (1962). To warrant punitive damages, a defendant's act or omission must be wantonly reckless or malicious. Intentional wrongdoing in the sense of a "evil-minded act" or wanton and wilful disregard for the rights of another must be established by the party seeking exemplary damages. *Nappe,* 97 *N.J.* at 49; *Berg,* 37

*N.J.* at 414. In a products liability setting the Supreme Court in *Fischer* v. *Johns-Manville Corp.*, 103 *N.J.* 643 (1986) held:[2]

> [P]unitive damages are available . . . when a manufacture is (1) aware of or culpably indifferent to an unnecessary risk of injury, and (2) refuses to take steps to reduce that danger to an acceptable level. This standard can be met by a showing of 'a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences.'" [*Id.* at 670-671 (quoting *Berg* v. *Reaction Motors Div.*, 37 *N.J.* 396, 414 (1962))].

While the evidence to support punitive damages was not overwhelming, we are satisfied that a jury could reasonably have concluded that Volkswagen was guilty of deliberate acts or omissions with knowledge of a high degree of probability of harm and reckless indifference to the consequences. *See Fisher*, 103 *N.J.* at 672-674; *Berg*, 37 *N.J.* at 414. The proofs were adequate to allow a jury to determine that Volkswagen knew long before the accident that dangerous sudden unwanted acceleration was caused, at least in part, by simultaneous actuation of brake and accelerator pedals; that Audi 5000s made in 1978 through 1983 were uniquely vulnerable to such simultaneous actuation; and that Volkswagen, instead of modifying the pedals, decided to blame driver error, even though Audi 5000 runaway incidents exceeded those of other Vol-

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[2] The parties do not question the availability of punitive damages in a design defect, product liability case; nor do we suggest that it is not an available remedy. *See Fisher v. Johns-Manville Corp.*, 103 *N.J.* 643, 670-674 (1986); *Nappe v. Anschelewicz, Barr, Ansell & Bonello*, 97 *N.J.* 37, 49 (1984); *Berg v. Reaction Motors Div.*, 37 *N.J.* 396, 412-413; *Fisher v. Johns-Manville Corp.*, 193 *N.J. Super.* 113, 120-121, aff'd 103 *N.J.* (1986); *Goncalves Eagle Picher Industries, Inc.*, 610 *F.Supp.* 61, 64-65 (D.C. Pa. 1985); *Gogol v. Johns-Manville Sales Corp.*, 595 *F.Supp.* 971, 976 (D.C. N.J. 1984). *See also N.J.S.A.* 2A:58C-5 (subsequent legislation allowing punitive damages in products liability actions) and *N.J.S.A.* 2A:58C-1, *et seq.*, Senate Judiciary Committee Statement (noting that the Products Liability Act is "intended as a remedial measure to clarify certain matters pertaining to the rules governing actions for harm caused by products and to establish statutory standards and procedures for the imposition of punitive damages").

kswagen marketed vehicles by a factor of 50 to 100. Creation of the Product Liaison Group, a quasi-legal department developed to investigate the acceleration problem, suggests that Volkswagen's remedial efforts were not merely slow, as acknowledged by the trial judge's opinion, but primarily concerned with profits and legal problems rather than prompt correction of a serious product safety hazard.

The jury's punitive damage award fell within the range where reasonable minds could differ, giving to the Gibbs' the benefit of all reasonable inferences from the evidence discussed above. Accordingly, we reverse the judgment NOV, and reinstate the punitive damage award.

## LIABILITY

Defendants urge that the trial court should have granted their summary judgment motion at the end of plaintiffs' case. They say that plaintiffs failed to prove causation by expert testimony, indirect evidence or negation of other possible causes; that simultaneous pedal actuation could not have caused this accident; that the trial judge improperly admitted recall letters, Volkswagen memoranda and NHTSA's report on pedal configuration; that plaintiffs failed to establish a defect; that jury selection was tainted by adverse publicity; that the charge to the jury was confusing; and that the submission of the punitive damage issue to the jury was unwarranted and prejudicial.

We have considered these claims in light of the record and applicable law. We conclude they are clearly without merit and affirm the underlying jury finding of liability. *R.* 2:11-3(e)(1)(A) and (E).

We add our view that the government report, identified as P-36, was admissible pursuant to *Evid. R.* 63(15). The trial judge properly concluded that the report was "a summary of

the objective findings based [upon] object[ive] uncomplicated testing procedures which are specified in the report itself. . . . What we have here are really not opinions." [3]

Defendants' claims respecting causation are without basis. While plaintiffs must establish their case by proofs that weigh heavier than mere surmise or conjecture, the burden of proof as to causation may rest upon legitimate inference. *See Jakubowski v. Minnesota Mining and Mfg.*, 42 *N.J.* 177, 182 (1964); *Kulas v. Public Service Elec. and Gas Co.*, 41 *N.J.* 311, 319 (1964). Evidence that the space between the gas and brake pedals was inadequate in 1979 Audi 5000s and the Horowitz car in particular, as well as Horowitz's testimony, coupled with documents indicating it was possible for Horowitz to have stepped on both gas and brake pedal without realizing it and thereby increase the speed of the car, was sufficient evidence of causation. The jury, which was properly charged on causation, rendered a verdict which is supported by competent evidence and should not be disturbed.

Neither negation of other causes, nor expert testimony was required on the issue of causation. Expert testimony is only required to support a claim when the subject matter is so esoteric that jurors of common judgment and experience are unable to make a determination without the benefit of the information and opinions possessed by a person with specialized knowledge. *See, e.g., Macri v. Ames McDonough Co.*, 211 *N.J. Super.* 636, 642 (App. Div. 1986). The trial judge correctly noted that a determination of causation— namely, whether an abnormally small gap between the brake and gas pedals in the Horowitz car allowed Horowitz to unknowingly actuate the accelerator when stepping on the brake, causing the

[3] Because of our determination, we need not reach the issue of the applicability of the recent United States Supreme Court opinion in *Beech Aircraft Corp. v. Rainey,* *U.S.* , 109 *S.Ct.* 439, *L.Ed.* 2d (1988). Even if the opinion were applicable here, our decision would remain unchanged.

car to shoot forward—was within the common judgment and experience of the average juror.

Additionally, recall letters as evidence of prior remedial conduct by defendants were properly admitted on the issue of defect and culpable conduct. *See Shatz v. Tec Technical Adhesives,* 174 *N.J.Super.* 135 (App. Div. 1980); *Lavin v. Fauci,* 170 *N.J.Super.* 403 (App. Div. 1979). Evidence of remedial efforts made after an accident is generally inadmissible on public policy grounds that it might discourage a person from making repairs after an accident if such remedial conduct were then to be used at trial to establish fault. *Evid. R.* 51; *Shatz,* 174 *N.J.Super.* at 141; *Price v. Buckingham Manufacturing Co, Inc.,* 110 *N.J.Super.* 462, 464-465 (App. Div. 1970). But no public policy would be furthered by allowing a defendant to keep from the jury evidence reflecting the sufficiency of remedial efforts undertaken before an accident, but after notice of defect. *See Shatz,* 174 *N.J.Super.* at 141. The law should not encourage marketing of defective products, *Ibid,* particularly, when, as here, the evidence of recall was introduced in part to show that remedial efforts as to a known dangerous condition were far too slow in coming owing to profit and loss considerations.

Volkswagen memoranda were properly admitted as relevant not only to notice, but to causation, as similar unwanted acceleration accidents were diagnosed by Volkswagen representatives as being caused by simultaneous actuation. At oral argument, defendants substantially conceded the issue of authentication regarding these documents. We do not quarrel with the trial judge's determination that the authentication issue was "specious."

We disagree with defendants' assertion that the plaintiffs failed to establish a defect. Plaintiffs presented the following evidence: Horowitz's testimony concerning the accident; vicarious admissions by Anderson that older Audi 5000s were

susceptible to sudden unwanted acceleration due to inadvertent simultaneous actuation of brake and gas pedals; Damoose's testimony that unwanted acceleration problems in the Audi 5000 were far greater than in other cars; Volkswagen's September 14, 1983 letter to NHTSA; and the NHTSA Control Pedal Performance Evaluation report. Thus, the jury, after being properly charged on defect, rendered a verdict which is reasonably supported by competent evidence and the legitimate inferences that can be deduced from that evidence.

Jury selection was proper. Even if a prospective juror has a preconceived opinion of a case, or has expressed one, that does not disqualify the juror so long as the juror has professed the ability to deliver a verdict on the evidence alone, and in the absence of malice or ill will. *See State* v. *Grillo,* 16 *N.J.* 103 (1954). The jury selection was not prejudicial, but fair, and the trial judge did not abuse his discretion.

As to defendants' many claims of error relating to the jury charge, we find that the charge, as a whole, clearly and correctly instructed the jury on all relevant principles of law pertinent to the case at bar. *See McDonough* v. *Jorda,* 214 *N.J. Super.* 338, 346 (App. Div. 1986).

Finally, because of our ultimate determination, we need not address defendants' claim that submission of the issue of punitive damages to the jury was unwarranted and prejudicial.

Affirmed in part and reversed in part.

I hereby certify that the foregoing is a true copy of the original on file in my office.

EMILLE R. COX
Acting Clerk

## Appendix D—Decision of the Superior Court of New Jersey Law Division, February 29, 1988

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CIVIL
DOCKET NOS.: L-71024-85 &
L-042484-86

GERMAINE GIBBS, LORI GIBBS, RAYMOND GIBBS & AMY GIBBS,
*Plaintiffs,*

*v*

TRANSCRIPT OF
MOTION FOR SUMMARY
JUDGMENT & BIFURCATION

HAROLD HOROWITZ, SYLVIA HOROWITZ, VOLKSWAGEN OF AMERICA, & BELL PORSCHE-AUDI
*Defendants.*

Monday, February 29, 1988
Union County Courthouse
Elizabeth, New Jersey

ORDERED BY: JOHN T. DOLAN, ESQ.

B E F O R E :

THE HONORABLE A. DONALD MCKENZIE, J.S.C.

A P P E A R A N C E S :

JAMES HELY, ESQ.
Attorney for the Gibbs

DAVID T. KERVICK, ESQ.
Attorney for the Germaine Gibb

Andrea M. Sanniola
Official Court Reporter
License No. XI01097

MESSR: ROBERT McANDREW
Attorneys for the Horowitz'
BY: THOMAS SANTANGELO, ESQ.

MESSRS: CRUMMY, DELDEO, DOLAN,
GRIFFENGER & VECCHIONE
Attorneys for Volkswagen of America &
Bell Porsche-Audi
By: JOHN T. DOLAN, ESQ.

*Appendix D*

* * *

THE COURT: Counsel, I don't invite replies.

You may be seated.

MR. DOLAN: I'll be very brief, your Honor.

THE COURT: Counsel, one of the ground rules of my court is this; and I have this dispute with other attorneys. So, this is not novel.

I am going to assume control of the case, and I'm going to decide when I want argument, and when I don't; and to the reply well, Judge, I have to make a record. Yes, as I've heard from other attorneys. I suggest this to you; your record is made when I say I don't want to hear any further argument. I'm ready to decide the matter, and I, really, think I'm doing the attorneys a favor, because, then, on appeal, you see, you can show how I didn't allow further argument, and, then, you could come up with many arguments that, maybe, you wouldn't have thought of on your feet, that might even be more persuasive for the Appellate Court.

MR. DOLAN: Your Honor.

THE COURT: And when we are all finished, we are going to hear more from witnesses then we are from the attorneys, and I'm putting you on notice right now, when—I've heard, really, more than what is necessary, much more then what is necessary. I knew what the issues were. I haven't heard anything new in this oral argument, and, really, as I say, you don't have to make a record for appellate purposes; and, therefore, I'm going to revert to my usual style, and that is, I am going to cut off Counsel quite often, and the main reason I want to do that is, namely, put you on notice, now, so it doesn't happen in front of a jury.

MR. DOLAN; I appreciate that, Judge. Just—I would like to make my record here, not on appeal.

THE COURT: No, Im sorry, sir. I may be wrong in my decisions, but for appeal purposes, as far as your record is concerned, you can do it in your brief there, and I look at it this way; just because I have about 10,000 words here in the way of briefs and reply briefs and certifications, aside from the documentation itself, doesn't mean that I have to listen to all those words being repeated in oral argument, particularly, when I've done my homework.

I'm going to deny the motion for partial summary judgment.

One thing that hasn't, really, been dealt with in all these arguments about all these facts and details is, that the issue, here, is the state of mind of the defendant. The inferences, therefore, that are to be drawn from all this evidence.

Even if I accepted your argument, Mr. Dolan, that there, really, are no issues of fact, that we've heard everything and seen everything that it plaintiff is going to put forward, that doesn't mean there are no material facts in dispute, because the material fact is what inferences do we draw from it?

For example, here, this is not a case where this defect was found the day before the accident. Defect, I use that word advisedly. Of course, problem is the better word, so that you didn't have a chance to do anything about it. It's not a case where, clearly, the problem is attributable to driver error or a third party, so that, clearly, the defendant has no responsibility.

It's a case where the issue is whether—what inferences a jury can draw, based on what they knew at Volkswagen, and what they did about it, and all you have to do is sit back and listen to Counsel argue for a good hour or more on those issues, and, you know, you've got a dispute; and to the extent that you argued the question of whether the standard is clear and convincing evidence or whether it's a preponderance of the evidence, and arguing that, that has something to do with this motion shows just what's wrong with this motion.

We are not up to the question of what proofs the plaintiff is going to be able to produce, and whether that proof, whether those proofs amount to proof by a clear preponderance of the credible evidence or something less than that. The analyization of the proofs will come at a later time, and I'm sure I'll hear the motion, and the opinion of the Court, more appropriately, perhaps, at the end of the plaintiff's case, when we know what the plaintiff's proofs are, and can assess the reasonable inferences to be drawn from them.

The motion is premature, because there are facts in dispute. Namely, the inferences to be drawn from the proofs of the plaintiff, and I'm, therefore, denying the motion, as I've indicated.

Let's get to this question of bifurcation.

Mr. Hely, let me ask you this; the—I see the thrust of the defendant's motion here, also, and a substantial question in the Court's mind is this; the numerous other cases of sudden acceleration in the Audi . . . .

* * *

THE COURT: All right. I'm going to consider the matter in chambers.

Remain available, please.

(Whereupon proceeding takes place after the recess.)

THE COURT: This case was instituted prior to the adoption of the products liability law, and, therefore, the provision for bifurcation, this Court finds, is not applicable to the present case.

The Court, here, simply, relies on the holding of our Supreme Court in *Fischer -v- Johns Mansville Corporation.* There, the Court recognized the differences and the problems in the proofs, involving the alleged defect and the issue of punitive damages, and, simply, held that these two issues can be

litigated together, and points out that the Court should, properly, instruct the jury, and, clearly, instructed the jury as to the distinction between the probative thrust of the evidence, where the evidence is limited to one issue or the other, and not probative otherwise.

I trust that I'll be able to do that. I do not see any substantial benefits toward—in the area of bifurcating the trial and, in fact, it could cause logistical problems referred to by Mr. Hely.

I recognize the possibility of prejudice from the jury hearing about numerous complaints which may be—may well be relevant, on the question of notice and whether what the response of the defendant was, in response to that notice, vis-a-vis whether there was a reckless indifference to the consequences, and some of the other language the courts have used.

Nevertheless, I find balancing it that the effective, hopefully, explanations of the Court and cautionary instructions will be, will suffice, and Counsel can submit, when we get there, any proposed jury charges on the subject. I do intend, also, to instruct them as we go along.

The motion for bifurcation, therefore, will be denied.

* * *

**Appendix E—Decision of the Superior Court of New Jersey Law Division, March 11, 1989**

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION—UNION COUNTY**
**DOCKET NO. L-71024-85 and L-042484-86**

GERMAINE GIBBS, LORI GIBBS, RAYMOND GIBBS & AMY GIBBS,

*Plaintiffs,*

*v.*

HAROLD HOROWITZ, SYLVIA HOROWITZ, VOLKSWAGEN OF AMERICA & BELL PORCHE AUDI,

*Defendants.*

**TRANSCRIPT OF PROCEEDINGS**

Union County Courthouse
Elizabeth, New Jersey
March 11, 1988

B E F O R E:
HONORABLE A. DONALD McKENZIE, J. S. C. and a Jury

TRANSCRIPT ORDERED BY:
JOHN T. DOLAN, ESQ.

A P P E A R A N C E S:
JAMES HELY, ESQ.
DAVID T. KERVICK, ESQ.
Attorneys for Plaintiffs

ROBERT McANDREW, ESQ.
BY: THOMAS SANTANGELO, ESQ.
Attorney for Defendants Horowitz

CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
BY: JOHN T. DOLAN, ESQ.
CHRISTINE AMALFE, ESQ.
Attorneys for Defendants

Gloria Speaks, C.S.R.
Union County Courthouse
Elizabeth, New Jersey

*Appendix E*

(The following took place out of the presence of the jury.)

THE COURT: All right. Mr. Dolan, I believe you have a motion.

MR. DOLAN: Yes, I do, sir.

THE COURT: All right. First of all let the record show it's now five minutes after nine. There are two violations of probation scheduled. Apparently neither one of them showed up. Ask my clerk to call them again before we bring out the jury. If they're not here I'll issue bench warrants.

Go ahead.

MR. DOLAN: Your Honor, I have a, an application pursuant to Rule 4:40 for judgment at this point at the close of the evidence. There's just a couple of exhibits that we can talk about. I don't think I have to straighten that out before I make the application now.

THE COURT: Make your motion.

* * *

With regard to punitive damages, your Honor, I started to make a motion on that aspect of the case at the conclusion of the plaintiffs' case. Your Honor indicated that you wanted me to defer that application at that point in time because you felt it was premature. I assume that it is no longer premature since all of the evidence is in, and I'm making that application at this time. Given the dictate of the cases which provide for the—standard for punitive damages, that is potential wrongdoing, and I'm of course looking to the criteria laid out by Fisher vs. John Manville where the court indicated that the quality of proofs required to support a claim for punitive damages, a great deal must be shown about the plaintiffs' conduct. There is a clear indication in that case, as your Honor is well aware and we've talked about it during the course of this trial, there must be an intentional wrongdoing in the sense that it is an evil

minded act or an act accompanied by a wanton and wilful disregard of the rights of another. There has been no showing, in our judgment, to satisfy that standard which I believe is the standard under the John Manville case, Fisher case.

Your Honor please, you have had the benefit of viewing the principal witnesses upon whom the plaintiff has focused in this case. You have heard testimony at length by Mr. Anderson who was the troubleshooter and field representative of the company investigating these accidents. You have heard from Mr. Cameron all day yesterday in connection with his understanding of the problem, his understanding being a reflection of the attitude and mind set of the company itself with regard to this problem. There is nothing, nothing that has been set forth by this plaintiff on its case which would in any way support a punitive damage case to go to the jurors' deliberations, and certainly, your Honor, after having heard the testimony and having had the opportunity to bring into judgment the credibility of these witnesses on this issue, it is our position that there is an overwhelming need to dismiss that aspect of this case at this time.

It is our position that to submit it to the jury at the same time they are in the jury room considering issues of liability would be overly prejudicial given the set of facts that we're dealing with here, overly prejudicial to the rights of Volkswagen on the liability issue if at the same time and during the same session this jury is called upon to deliberate on the issue of punitive damages.

Without reading it, I would cite to the court a case which is in the Supreme Court of Virginia which we have set forth in our submission back at the outset of this trial on the issue of punitive damages. That is the case of Ford Motor Company vs. Bartholomew 297 Southeast Second at 683, 684. This is a case which is strikingly similar to the case with which we are dealing. It is a case in which they were dealing with a punitive damage application. It was a case in which there was an automotive

claim for a design defect; where there were investigations out into the field; where there was an interfacing with the NHTSA; where there was virtually a parallel pattern of activity as to that which we have in our case, and in that case the punitive damages as a matter of law was not considered appropriate, and I would recommend that pursuant to, even though it's Supreme Court of Virginia, recognize that your Honor's not bound by that finding yet it is illustrative of the point that we're making on this application. I submit that the reasoning in that case should be taken into account in considering this application.

If your Honor is disposed not to grant this application with respect to punitive damages, your Honor, our second application in that regard is to bifurcate that issue from the jurors' deliberations. What I mean by that is this, Judge. I'll be very brief. It is our application that the jury be called upon to deliberate with respect to the liability issue initially. Your Honor can charge on that. The attorneys, I submit, should not sum up on punitive damages at this point in the case. My application is that you give us a direction that we sum up on liability, that you charge on liability, that jury be—we talked about this early on at the outset of the case, the jury deliberate on that issue, and depending upon how they come out of that issue, then the same jury, as we indicated at the outset, and then deliberate on punitive damages; that there will be a new set of charges at that point by your Honor, and that there will be another opportunity for counsel to then address the issue of punitive damages in a second closing. That would be the way, given the circumstances of this case and the shallow footings on which that claim is based, I think that that would be the appropriate way to handle it, your Honor. Respectfully submit that for your consideration.

* * *

*Appendix E*

THE COURT: Mr. Hely.

Mr. Hely: Your Honor, yesterday afternoon you indicated you wanted to reserve on this, and if so, I would want to incorporate my summation arguments into your decision on the motion

THE COURT: You waive any arguments to the court outside of your summation then?

MR. HELY: If your Honor's going to reserve. I must say in—the last time we had this motion I was surprised. I didn't feel the necessity of going through every document that I felt proved my case. I was surprised at the court's ruling, so if the court is willing to accept the summations of counsel as my arguments on this motion, that will be fine with me, Judge.

THE COURT: I will—I am going to deny the motion insofar as Count Two is concerned. I'm satisfied that jury could reasonably find that the low brake pedal design and/or the problem of the configuration of the and relationship between the brake and accelerator pedal was at least one of the proximate causes of the accident, and therefore I'm going to deny the motion.

As to the motion for punitive damages, I'm going to—that's Count Three. As to motion for judgment for defendant on that count, I'm going to deny that. We've already dealt with it. I've already decided it. I see no reason to change my decision. Bifurcation in any form is denied. We'll submit all issues to the jury at one time.

Anything else at this point?

* * *

## Appendix F—Decision of the Superior Court of New Jersey, Law Division, March 14, 1988

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION—UNION COUNTY**
**DOCKET NO. L-71024-85 and**
**L-042484-86**

GERMAINE GIBBS, LORI GIBBS, RAYMOND GIBBS & AMY GIBBS,
*Plaintiffs,*

*v.*

HAROLD HOROWITZ, SYLVIA HOROWITZ, VOLKSWAGEN OF AMERICA & BELL PORSCHE AUDI,
*Defendants.*

**TRANSCRIPT OF JUDGE'S DECISION**

Union County Courthouse
Elizabeth, New Jersey
March 14, 1988

TRANSCRIPT ORDERED BY: JOHN T. DOLAN, ESQ.

B E F O R E :
HONORABLE A. DONALD McKENZIE, J. S. C. and a Jury

A P P E A R A N C E S :
JAMES HELY, ESQ.
DAVID T. KERVICK, ESQ.
Attorneys for Plaintiffs

ROBERT McANDREW, ESQ.
BY: THOMAS SANTANGELO, ESQ.
Attorney for Defendants Horowitz

CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
BY: JOHN T. DOLAN, ESQ.
CHRISTINE AMALFE, ESQ.
Attorneys for Defendants

Gloria Speaks, C.S.R.
Union County Courthouse
Elizabeth, New Jersey.

*Appendix F*

THE COURT: A motion was made for judgment in favor of the defendant Volkswagen on the punitive issue of damages at the end of the proofs pursuant to Rule 4:40-2. The court reserved decision on that. I am at this time going to enter judgment N. O. V. in favor of the defendant.

Much of the evidence as to what the defendant did upon learning this problem is not contested. As a matter of fact, the plaintiffs' basic proofs as to what the defendant Volkswagen did or did not do comes from the Volkswagen records and files, and the testimony of such witnesses as Mr. Anderson as to what he did was not really contested, and I don't find it inherently incredible, and from that I do not believe a reasonable jury could find that Volkswagen did not move on this problem and try to ascertain the cause and correct it. The cause is still not pinpointed by defendant or any other automotive expert certainly, and this has to be pointed to. Most specifically the plaintiff himself—plaintiffs themselves were unable to produce an expert to say just what that problem was they say Volkswagen should have solved and corrected.

As to the theory on which from the evidence the plaintiff was limited to simultaneous actuation, the defendant did attempt to lessen that problem by raising the height of the brake pedal to cut down the—further the possibility of simultaneous actuation, and the fact that it came too late to prevent this accident, if indeed it could prevent the accident at all, I don't find is a basis to fault Volkswagen.

The time period we're talking about here were not that shocking. They were moving on the problem and they shouldn't be penalized because some of their engineers were in Germany; obviously would take awhile to get the vehicles over there, arrange for their engineers to come over here and work on the problem.

Furthermore, the problem is one which is difficult to investigate and pinpoint because, the driver of the vehicle, the

prime source of the information, may well be unaware of what he's doing. Keep in mind this is not a general defect case now, and therefore, we're talking about simultaneous actuation. That's the problem that the defendant here is accused of consciously covering up, disregarding to the injury of the public and specifically these plaintiffs, and when you have drivers who insist that that isn't the way it happened, that they did have their foot on the proper pedal, the fact the solution is not found promptly or even by this time, again pointing to the only theory on which this case went to the jury is not in the area where this jury—where this court believes jury could reasonably find there was a type of intent to cover it up, conscious disregard, reckless indifference, etc. that's necessary to bottom a finding of entitlement to punitive damages.

Compare, for example, if this case was one of a defect in the transmission system having nothing to do with driver error, the theory, as I understand it, that plaintiffs' expert was going to testify to. Here's something entirely within the design of the car and something that some argument could be made just as a matter of common sense that the engineers should have come up with a solution and done something about it more readily than they did. And again, pointing out that still nobody can say to this day what the problem was that Volkswagen is accused of covering up and not solving readily.

This case should be compared with the leading case of Fisher vs. John Manville. There the defendant was well aware of the problem and knew of the very injurious effect it had upon the health of its workers and did absolutely nothing to correct it or call the attention of the workers to the problem for matter of years.

It could be said at best, and this court would question that, but if it were the test I would leave it to the jury that the defendant Volkswagen was negligent in not putting in a bigger effort, not giving more time—giving more attention to time going by; that they could have expedited it more, but that's the

most that can be said. This state of mind that calls for punitive damages that I defined to the jury I simply do not believe could be found from the evidence, giving the benefit of all the reasonable inferences to the plaintiffs here.

I might say that I will concede that the issue is rather novel. We haven't had a decision that would cover these type of proofs, and I therefore feel that at least the case is an appropriate, appropriate position to go to an appellate court for a decision one way or the other whereas if I had decided the case short of this point in time, if the court's view of it is wrong everybody would have had to come back and try the issue all over again, and I also believe the matter was one that was going to go up on appeal no matter which way it went and I have a feeling that everybody was ready to go up on appeal on this anyway. This way the Appellate Division can give their view and they have mine for whatever it may be worth.

Anything else?

MR. DOLAN: Thank you, sir.

THE COURT: You're welcome.

MR. HELY: Thank you, your Honor.

MR. SANTANGELO: Thank you, your Honor.

*Appendix F*

## CERTIFICATE

I, GLORIA SPEAKS, a Certified Shorthand Reporter of the State of New Jersey do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes taken at the time and place hereinbefore set forth.

GLORIA SPEAKS

Gloria Speaks
Certified Shorthand Reporter
License No. XI00424

Date: March 16, 1988

**Appendix G—Affidavit of Guy V. Amoresano, filed March 11, 1988**

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Gateway Center
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(201) 622-2235
Attorneys for Defendants
Volkswagen of America, Inc. and
Bell Porsche Audi

GERMAINE GIBBS,
*Plaintiff,*

*vs.*

SYLVIA HOROWITZ,
HAROLD HOROWITZ,
VOLKSWAGEN OF AMERICA, INC.
and BELL-PORSCHE AUDI,
*Defendants.*

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-07125-85
(Consolidated with L-017024-85 and L-042484-86)**

**Civil Action**

**AFFIDAVIT OF
GUY V. AMORESANO**

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.:

I. GUY V. AMORESANO, of full age, being duly sworn according to law, upon my oath depose and say:

1. I am an attorney at law of the State of New Jersey and am associated with the law firm of Crummy, Del Deo, Dolan, Griffinger & Vecchione, A Professional Corporation, attorneys for defendants Volkswagen of America, Inc. and Bell-Porsche Audi in the above captioned matter. I am familiar with the following facts.

*Appendix G*

2. Attached hereto as Exhibit A and made a part hereof is a true copy of the Submission by defendants Volkswagen of America, Inc. and Bell-Porsche Audi Regarding the Admissibility of Plaintiff's Proposed Exhibits, which was filed with the Union County Clerk on Thursday, March 3, 1988 and bears the Clerk's stamp "Received and Filed" on that date. On the same date, copies of the filed submission were personally delivered to and served upon the Honorable A. Donald McKenzie, J.S.C., and all counsel of record.

3. The attached and incorporated Submission, was prepared at the direction of Judge McKenzie, and contains defendants' objections to the admissibility of plaintiffs' proposed exhibits noted therein and the legal arguments upon which such objections are grounded.

4. Attached hereto as Exhibit B are Requested Jury Charges and Special Interrogatories, copies of which were personally delivered to and served upon the Honorable A. Donald McKenzie, J.S.C., and all counsel of record on March 10, 1988.

GUY V. AMORESANO

Sworn to and subscribed
before me on this 11th
day of March, 1988.

PATRICIA DELLA FERA
A Notary Public of New Jersey
My Commission Expires Aug. 17, 1992

* * *

*Appendix G*

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A Professional Corporation
One Gateway Center
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Attorneys for Defendants
Volkswagen of America, Inc.
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GERMAINE GIBBS,
*Plaintiff,*

*vs.*

HAROLD HOROWITZ, SYLVIA HOROWITZ, VOLKSWAGEN OF AMERICA, INC. and BELL PORSCHE AUDI,
*Defendants.*

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION: UNION COUNTY**
**Docket No. L-071025-85**
**(Consolidated with L-071024-95 and L-042484-86)**

**Civil Action**

**REQUESTED CHARGE**

In the event that the concept of punitive damages is to be charged to the jury, in addition to the standard charges, defendants Volkswagen of America, Inc. (hereinafter referred to as "VWoA") and Bell Porsche Audi respectfully request the court to charge the jury in accordance with the charges which are appended hereto.

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
Attorneys for Defendant
Volkswagen of America, Inc.
and Bell Porsche Audi

By: JOHN T. DOLAN
John T. Dolan

Dated: March 9, 1988

*Appendix G*

**PUNITIVE DAMAGES CHARGE**

You should now consider whether plaintiff is entitled to punitive damages, which are only awarded in exceptional cases not to compensate the plaintiff but, rather, to punish the defendant and to deter others from engaging in the same or similar conduct.[1]

In determining whether to impose punitive damages on VWoA, you must consider its conduct in causing the event complained of by the plaintiff. Thus, the plaintiff must prove a great deal more about VWoA's conduct than merely that it manufactured and supplied the automobile in question.[2] Even if you determine that plaintiff has proved that the product herein was defective and that it proximately caused the injuries alleged, in order to award punitive damages against VWoA, you must find that plaintiff has also sufficiently proven facts about VWoA's intentions, motives and conduct to justify the extraordinary award of punitive damages.

In order to award punitive damages, you must find that VWoA acted with actual malice. Actual malice is essentially an intentional, deliberate or conscious wrongdoing or an evil-minded act done with spite or evil intentions demonstrating circumstances of extreme outrage.[3] Entitlement to punitive damages may also be proven if plaintiff demonstrates that VWoA undertook a deliberate act accomplished by a wanton or willful disregard of the rights of another.[4] In other words, you must find that VWoA was aware of, or was recklessly indifferent to the danger or consequences of its acts and yet, with that knowledge, refused to take steps to reduce the danger to an acceptable level.[5]

---

[1] *See Nappe v. Anschelewitz, Barr Ansel & Bonello,* 97 N.J. 37 (1984).

[2] *Fischer v. Johns-Manville Corp.,* 103 N.J. 643, 654 (1986).

[3] *Nappe,* 97 N.J. at 49; *DiGiovanni v. Pessel,* 55 N.J. 188, 191 (1970); *Berg v. Reaction Motors Div.,* 37 N.J. 398, 413-414 (1962).

[4] *Fischer,* 103 N.J. at 671; *Nappe,* N.J. at 49; *Berg,* 37 N.J. at 414.

[5] *Fisher,* 103 N.J. at 670-671.

*Appendix G*

Punitive damages may not be awarded if you find that VWoA was merely inadvertant, neglectful or that it made a mistake or error in judgment.[6] Further, should you determine that VWoA acted conscientiously and in good faith to lessen the danger to others, there can be no award of punitive damages made.[7]

You have heard evidence presented by the parties in this case concerning both the alleged defect or problem with the automobile in question as well as the efforts by VWoA to ascertain and correct the potential problem by making several recalls of their products. You should carefully consider this evidence in making your determination as to an award of punitive damages. Recall that even if defendant did not, in hindsight, choose the best possible course of action, or inadvertantly overlooked a potential danger, this will not be sufficient to justify an award of punitive damages absent proof that the defendant's conduct was accompanied by the purposeful intention and knowledge to do harm to others. Thus, if you determine that VWoA did not act with the requisite evil intent or indifference or, conversely, that the efforts of VWoA to correct the alleged problems were done in an attempt to reduce danger to others, punitive damages should not be awarded and you should cease all further deliberations in this regard.

---

[6] *Nappe*, 97 N.J. at 80; *DiGiovanni*, 55 N.J. at 190; *Berg*, 37 N.J. at 414; *Enright v. Lubow*, 202 N.J. Super. 58, 77 (App. Div. 1985).

[7] *Berg*, 37 N. J. at 415; *Lopez v. Entwistle*, 214 N.J. Super. 680, 686 (Law Div. 1987).

*Appendix G*

**Special Interrogatories.**

1. Was the conduct of defendant VWoA in regard to this matter malicious, evil minded, or done with a wanton or wilful disregard of the rights of others?

Yes ____ No ____

2. If the answer above is in the affirmative, what amount of money would adequately punish defendant VWoA in this case?

$ _____

*Appendix G*

## ADDENDUM TO PUNITIVE DAMAGE CHARGES

### RE: BURDEN OF PROOF

In order to impose punitive damages based upon the charges I have just read to you, you must find clear and convincing proof that defendant VWOA maliciously acted with spite or evil intention or wilfully or wantonly disregarded the rights of others. Clear and convincing proof is that level of proof which produces a firm belief or conviction as to the truth of the evidence presented. It is a level of proof more than a preponderance of evidence but less than proof beyond a reasonable doubt.

*Fischer v. John-Manville Corp.*,
103 N.J. 643 (1986),
*In re Penica*, 36 N.J. 401 (1962);

(2)

No. 89-228

IN THE
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VOLKSWAGEN OF AMERICA, INC., and
BELL PORSCHE-AUDI INC.,
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v.

GERMAINE GIBBS, AMY GIBBS, LORI GIBBS, and
RAYMOND GIBBS,
*Respondents.*

**On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division**

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF THE PETITION

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ZIP

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-228

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VOLKSWAGEN OF AMERICA, INC., and
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v.

GERMAINE GIBBS, AMY GIBBS, LORI GIBBS, and
RAYMOND GIBBS,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division**

---

## MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

---

Pursuant to Rule 36 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("Advisory Council"), requests leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners has consented to the filing of this brief; counsel for the respondents has withheld consent.

The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. The issues presented by the petition have such significance because business activities by manufacturers such as those who constitute the membership of the Advisory Council have borne the brunt of a dramatic increase in the frequency and size of punitive damages verdicts in the last two decades. Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* iii, 50 (1987).* Even more disturbing is that "[j]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

These empirical studies confirm what legal scholars and jurists have increasingly been noting: the woeful lack of procedural safeguards in punitive damages proceedings encourages punitive awards that are unpredictable and based on prejudice and caprice. The result has been to impose directly on manufacturers, and indirectly on consumers, workers, investors, and taxpayers, an increasing burden of unnecessary, unjustified punishments.

---

* The authorities cited in this motion are also cited in the accompanying brief. The location of those authorities within the brief is identified in the Table of Authorities.

Accordingly, the Advisory Council seeks to submit the accompanying brief as *amicus curiae* to assist the Court in evaluating the public importance, practical consequences, and need for review of the punitive damages questions presented in the petition for a writ of certiorari. The Advisory Council requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted for that purpose.

Respectfully submitted,

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*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) .. 3, 9
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*International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979) ..... 3, 11
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*Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989) ..... 6
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*Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Cir. Ct. Feb. 29, 1988) ..... 6
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| *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) | 6 |
| *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) | 6 |
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| *Veselenak v. Smith*, 414 Mich. 567, 327 N.W.2d 261 (1982) | 10 |
| *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972) | 10 |
| *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) | 10 |
| *STATUTES* | |
| Ala. Code § 6-11-20 (Supp. 1988) | 10 |
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| Mont. Code Ann. § 2[illegible]-1-221(5) (1987) | 11 |
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| Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) | 7 |
| D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* (1987) | 4 |
| P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988) | 8 |
| Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870 (1976) | 3 |
| Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982) | 3, 10, 12 |
| M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* (1987) | 8 |
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| Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. —— (1989) (forthcoming) | 5n |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-228

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VOLKSWAGEN OF AMERICA, INC., and
BELL PORSCHE-AUDI INC.,
*Petitioners,*

v.

GERMAINE GIBBS, AMY GIBBS, LORI GIBBS, and
RAYMOND GIBBS,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division**

---

## BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF THE PETITION

---

### INTEREST OF THE AMICUS CURIAE

The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. The interest of the Advisory Council in the punitive damages questions presented in the petition for a writ of certiorari is fully described in the accompanying motion for leave to file this brief as *amicus curiae* in support of the petition.

## PRELIMINARY STATEMENT

As shown in the opinion of the Superior Court of New Jersey, Appellate Division (Appendix C to the petition), the jury in this product liabiltiy action returned a verdict in favor of one of the plaintiffs for $10,000 in compensatory damages and $100,000 in punitive damages, and verdicts aggregating $5,000 in compensatory damages in favor of the other three plaintiffs. As shown in the other appendices to the petition, the jury was permitted, over the defendants' timely objections, to decide the punitive damages issues based on a mere preponderance of the evidence and in a non-bifurcated trial in which the issues of tort liability, compensatory damages, and punitive damages were decided together.

The defendants have petitioned this Court to consider whether the Due Process Clause of the Fourteenth Amendment (1) permits punitive damages to be imposed on such a minimal burden of proof and (2) permits liability and punishment to be determined together in a non-bifurcated trial when a defendant has moved for bifurcation to achieve separate consideration of the punitive damages issues. The Advisory Council urges the Court to review those issues.

## REASONS FOR GRANTING THE PETTTION

### REVIEW BY THIS COURT OF THE CONSTITUTIONALITY OF PUNITIVE DAMAGES PROCEDURES SUCH AS THOSE EMPLOYED BELOW IS NEEDED BECAUSE OF THE IMPORTANCE OF THE ISSUE TO THE CONSUMING PUBLIC AND TO THE MANUFACTURING COMMUNITY

Twice in the last three years, this Court has suggested that the prevailing system under which punitive damages are awarded presents constitutional issues that need to be addressed. *See Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). Last term, the Court,

while holding that the Eighth Amendment's Excessive Fines Clause does not limit the size of punitive damages awards to private plaintiffs, explicitly left for another day the question of whether due process requires more procedural protection than is currently afforded to defendants in punitive damages proceedings. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989).

In addition, in opinions in a variety of contexts, seven current members of the Court have characterized prevailing punitive damages laws as permitting unpredictable punishment based upon caprice or prejudice. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Marshall, Blackmun & Rehnquist, JJ.) (with Powell, J.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (with Burger, C.J., & Powell, J.); *Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. at 1655 (O'Connor & Scalia, JJ., concurring in judgment); *International Bro. of Elec. Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979) (Marshall, Brennan & White, JJ.) (with Stewart & Powell, JJ.); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Blackmun, White & Rehnquist, JJ.) (with Burger, C.J., & Stewart & Powell, JJ.) Likewise, there has been an outpouring of legal scholarship critical of the absence of procedural protection in punitive damages proceedings. *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982); Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870 (1976); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defense Products*, 49 U. Chi. L. Rev. 1 (1982); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

Nevertheless, intolerably in a nation that guarantees due process, New Jersey and many other states have

chosen to withhold the procedural protection needed to honor that guarantee. In New Jersey, as elsewhere, the punitive damages system is characterized by (1) an absence of clear standards for defining the conduct and culpability on which punishment may be based; (2) an absence of *any* standard to determine whether punishment should be imposed, once the requisite culpability has been found; (3) an absence of standards for determining the appropriate amount of punitive damages, once the decision to impose some punishment has been made; and (4) an absence of objective standards for judicial review. Even worse, punishment under these vague laws is imposed under the minimum possible burden of proof, and jury consideration of liability, compensatory damage, and punishment issues occurs in a single, non-bifurcated proceeding. This procedural wasteland not only permits, but promotes, jury confusion and verdicts based on passion, prejudice, and caprice.

This case squarely presents the question of whether due process requires something more. It does so by addressing two specific procedural matters long recognized as being central to achieving fairness in punishment proceedings—namely, the burden of proof and the separation of the determination of guilt or innocence from the determination of punishment. The need for an answer by this Court has never been greater, especially in product liability litigation.

A recent empirical study by the RAND Institute for Civil Justice shows that the growth of the average award in litigation that manufacturers now regularly find themselves defending "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" in only two decades. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). A primary element in that explosion has been the phenomenal increase in both

the frequency and size of punitive damages awards against manufacturers.*

---

* The mushrooming of punitive damages awards in product liability litigation in recent years is undoubtedly due in part to the nature of the expansion of design-defect product liability rules during the same period:

> The parallel developments of product-line litigation and increased punitive damages awards in product liability litigation appear to be related. Manufacturing defects, such as the occasional "exploding" carbonated-beverage container or the occasional impurity in a food package, generally have been viewed as mere aberrations or accidents. Punitive damages have rarely been sought and almost never awarded for those defects. On the other hand, plaintiffs almost always can, and now regularly do, characterize an alleged design defect or failure to warn as an intentional, calculated choice made by the manufacturer. It is in this context that juries now regularly hear plaintiffs' plea to punish manufacturers for "trading lives for profits."
>
> Modern substantive tort law principles tend to make punitive-damages arguments of that nature available in every design-defect and inadequate-warning case. Both the standard cost-benefit negligence test articulated by Judge Learned Hand in *United States v. Carroll Towing Co.* and the risk-utility test that now governs strict-liability product cases in most jurisdictions are based on the premise that manufacturers should make design and warning decisions by trying to determine whether the expected societal benefits of a contemplated design or warning outweigh the expected societal costs of that design or warning. Ironically, however, the more explicitly a manufacturer tries to make that determination *ex ante*, the greater is the risk that, if a jury subsequently weights the factors differently *ex post*, punitive damages will be imposed on the ground that the manufacturer knew that some number of injuries and deaths would occur and "consciously disregarded" them to maximize profits.

Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. —— (1989) (forthcoming) (footnotes omitted). Perversely, therefore, expansion of manufacturers' liability on the theory that strict product liability focuses on the product, not the producer, has resulted in more and larger punitive awards, which are supposed to be based on the producer's conduct and culpability.

Before 1970 there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, and that was an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a product-liability punitive damages verdict that is, like the one in this case, many times larger than the compensatory damages, or that is for several million dollars, or both. *See, e.g., O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitive damages verdict), *cert. denied*, 108 S. Ct. 2014 (1988); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989) ($7 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct, 1, 1987) ($75 million punitive damages verdict, remitted to zero); *George v. Raymark Industries, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) ($75 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Cir. Ct. Feb. 29, 1988) ($11.25 million punitive damages verdict); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) ($16.25 million punitive damages verdict); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million punitive damages verdict); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988) ($12.5 million punitive damages verdict, remitted to $4 million), *cert. denied*, 109 S. Ct. 3265 (1989); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 19, 1988) ($10 million punitive damages verdict, remitted to $375,000).

The effect of these punitive awards on the American public has been, and continues to be, devastating. Important health products have drastically risen in price or been withdrawn from the market altogether. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct.

at 2924 (discussing the "detrimental effect on the research and development of new products," including prescription drugs) (O'Connor & Stevens, JJ., concurring); *Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin, a morning-sickness drug, from market after price increased by more than 300 percent; also discussing withdrawal of all but two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to $11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine). Promising new products have been withheld from introduction altogether. *See Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751 P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance). American manufacturers have fallen behind in the development of major product groups. *See, e.g.*, Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area [of contraceptive technology]—with potentially disastrous consequences for women and men in this country and elsewhere").

A less obvious effect of these Draconian punishments is that they spawn more frivolous lawsuits, prolong trials, and generate more appeals, all of which further disrupt the country's manufacturing activities. Moreover, the unpredictability of such awards makes it considerably more difficult for manufacturer-defendants and plaintiffs to evaluate cases for settlement. And these punishments have resulted in a "tax" on many products purchased by consumers:

> The tax accounts for 30 percent of the price of a stepladder and over 95 percent of the price of childhood vaccines. It is responsible for one-quarter of the price of a ride on a Long Island tour bus and one-third of the price of a small airplane. . . . [I]t adds more to the price of a football helmet than the cost of making it. The tax falls especially hard on prescription drugs, doctors, surgeons, and all things medical.

P. Huber, *Liability: The Legal Revolution and Its Consequences* 3 (1988).

The procedural infirmities in the punitive damages system also have led to an extraordinary number of post-trial reductions of jury awards. RAND researchers found, for example, that 48 percent of the defendants who had punitive damages verdicts rendered against them paid less than the amount of the verdict, either because of post-trial settlement or because of post-trial judicial action. *See* M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* 26-30 (1987). An earlier study found that,

> out of forty-five reported cases decided by the New York appellate courts in the last decade in which the court determined whether there was sufficient evidence of malice to support any punitive award or determined whether the jury had awarded an excessive amount of punitive damages, thirty-five punitive damages awards were remitted or reversed.

Wheeler, *supra*, 69 Va. L. Rev. at 288. This frequent overturning of jury verdicts indicates that the procedures employed at trial are not adequately ensuring proper results.

In sum, the unpredictability, frequency, and magnitude of punitive damages awards against manufacturers are eroding our industrial base, detracting from the health and comfort of the consuming public, creating judicial diseconomies and inefficiency, and undermining our jury

system. Therefore, there is an urgent need for this Court to decide whether due process requires New Jersey and other states to provide the procedural safeguards whose absence has fostered these harmful results.

### A. *The Need for Consideration of Whether Due Process Requires a "Clear and Convincing Evidence" Burden of Proof in Punitive Damages Proceedings*

This Court has held that a "clear and convincing evidence" burden of proof is necessary to preserve fundamental fairness in proceedings that threaten one of the parties with significant stigma. *See Santosky v. Kramer*, 455 U.S. 745, 762 (1982). The Court in *Santosky* stated that this burden of proof is especially required in proceedings in which there are "imprecise substantive standards that leave determinations unusually open to the subjective values of the [trier of fact]." 455 U.S. at 762. Punitive damages proceedings like the one below precisely fit that profile.

Punitive damages proceedings in New Jersey, as in many other states, threaten the defendants with significant stigma because punitive damages may be awarded only upon a jury's pronouncement that the defendant has committed "an 'evil-minded act' or an act accompanied by a wanton or willful disregard of the rights of another." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 655, 512 A.2d 466, 472 (1986). In addition, the standards pursuant to which punitive damages are awarded and reviewed have been widely recognized by courts and commentators as both imprecise and subjective. *See e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, Marshall, Blackmun & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), ("Our reaction [in reviewing punitive damages verdicts] is admittedly visceral."), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29

(1971); Ellis, *supra*, 56 S. Cal. L. Rev. at 34-43, 53-56; Owen, *supra*, 49 U. Chi. L. Rev. at 10-49.

Accordingly, it is not surprising that, in the seven years since this Court decided *Santosky*, numerous courts, legislatures, and scholars have agreed that punitive damages proceedings require the safeguard of a burden of proof beyond a mere preponderance of the evidence. Indeed, fully half of the states in this country now either disallow punitive damages in product liability actions or require that punitive damages rest upon proof by clear and convincing evidence or proof beyond a reasonable doubt. *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986) (clear and convincing evidence); *Traveler Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982) (same); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) (same); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 458 (1980) (same); *Killebrew v. Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978) (punitive damages not allowed unless expressly authorized by statute); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943) (same); *Veselenak v. Smith*, 414 Mich. 567, 327 N.W.2d 261 (1982) (punitive damages not allowed when actual damages provide compensation for mental distress and anguish); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975) (punitive damages not allowed); *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972) (same); *Stanard v. Bodin*, 88 Wash. 2d 614, 565 P.2d 94 (1977) (punitive damages allowed only if expressly authorized by statute); Ala. Code § 6-11-20 (Supp. 1988) (clear and convincing evidence); Alaska Stat. § 09.17.020 (1986) (same); Cal. Civ. Code § 3294(a) (Deering Supp. 1989) (same); Fla. Stat. § 768.73 (1987) (same when punitive award exceeds three times compensatory award); Ga. Code Ann. § 51-12-5.1(b) (1987) (clear and convincing evidence); Iowa Code § 668.A.1 (1987) (same); Kan. Stat. Ann.

§ 60-3701(c) (1988) (same); Ky. Rev. Stat. Ann. § 411.184(2) (Baldwin 1988) (same); Minn. Stat. Ann. § 549.20 (West Supp. 1988) (same); Mont. Code Ann. § 27-1-221(5) (1987) (same); Ohio Rev. Code Ann. § 2307.80(A) (Anderson 1987) (same for product liability actions); Okla. Stat. tit. 28, § 9 (1987) (clear and convincing evidence required if punitive award exceeds compensatory award); Or. Rev. Stat. § 30.925 (1988) (clear and convincing evidence required for product liability actions); Utah Code Ann. § 78-18-1 (Supp. 1989) (clear and convincing evidence); Colo. Rev. Stat. § 13-25-127(2) (1987) (proof beyond a reasonable doubt).

Unfortunately, the State of New Jersey and others like it have not seen fit to provide this basic safeguard against the abuses and fundamental unfairness that flow from procedures that permit discriminatory punishment based on subjective, imprecise standards. Review by this Court is needed to prevent these states from continuing to deprive defendants of the procedural protection guaranteed by the Due Process Clause.

### B. *The Need for Consideration of Whether Due Process Requires Bifurcation in Punitive Damages Trials When Requested by the Defendant*

The importance of the bifurcation of punitive damages trials likewise arises from the importance of ensuring that state-sanctioned punishment not be imposed on the basis of passion, prejudice, or jury confusion. This Court has recognized that the penal purpose of punitive damages and the evidence used to prove punitive damages claims present substantial risks of such improper verdicts.

The Court has stated, for example, that "punitive damages may be employed to punish unpopular defendants." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 50 & n.14. *Accord City of Newport v. Fact Concerts,*

*Inc.*, 453 U.S. at 270 ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award."); *Smith v. Wade*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., Burger, C.J., & Powell, J., dissenting).

In addition, the New Jersey Supreme Court has emphasized that strict product liability claims and punitive damages claims are fundamentally different "in purpose and in the policies each seeks to promote" and that "evidential differences" also separate the two. *Fisher*, 103 N.J. at 656, 512 A.2d at 473. Thus, when punitive damages issues and strict liability issues are tried together, a serious risk of jury confusion arises.

The New Jersey Supreme Court also has recognized that the need to place limits on the total punishment in product liability litigation requires that a defendant be allowed to introduce evidence of other adverse judgments, of the defendant's financial status, and of the effect that a punitive award would have. *Fischer*, 103 N.J. at 669, 512 P.2d at 480. But the same court has further recognized "that defendants may be reluctant to alert juries to the fact that other courts or juries have assessed punitive damages for conduct similar to that being considered by the jury in a given case." *Fischer*, 103 N.J. at 670, 512 A.2d at 480. *Accord* Wheeler, *supra*, 69 Va. L. Rev. at 295 ("This well-intentioned principle, however, offers little solace to a defendant who must face a jury that will decide liability, compensatory damages, the question of whether to award any punitive damages, and the amount of punitive damages."); Owen, *supra*, 49 U. Chi. L. Rev. at 52-53. Accordingly, bifurcation is needed to make the right to introduce such important evidence real, not illusory.

The New Jersey Legislature has recognized as much. In 1987 that body enacted product liability reform legislation that expressly requires bifurcation of punitive damages proceedings. *See* N.J.S.A. 2A:58C-5(b). But the court below held the legislation inapplicable to this case and refused the defendants' motion for bifurcation.

There is, in sum, an urgent need for this Court to consider whether New Jersey and like states have failed to provide procedural safeguards that are constitutionally required. *See Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. at 1655 ("the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits") (O'Connor & Scalia, JJ., concurring in judgment). The availability of the two specific safeguards in question will substantially affect the fairness of punitive damages proceedings, the size of product liability judgments, litigation costs, the efficient settlement of lawsuits, and the availability and price of manufactured products to the American public.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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(3)

No. 89-228

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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VOLKSWAGEN OF AMERICA, INC., AND
BELL PORSCHE-AUDI, INC.,
Petitioners

vs.

GERMAINE GIBBS, AMY GIBBS,
LORI GIBBS AND RAYMOND GIBBS
Respondents

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# BRIEF IN OPPOSITION TO WRIT OF CENTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

---

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Counsel for Respondents

October 15, 1989

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## ARGUMENT

### POINT I

### THE TWO DUE PROCESS ISSUES RAISED BY PETITIONERS WERE SIMPLY NEVER RAISED BEFORE THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT

Respondent shall strictly follow the mandate of United States Supreme Court Rule 22.2. by responding with a brief that is "as short as possible." The simple fact is that petitioners never raised either of the two due process claims they now make in their Petition when the matter was fully before the Appellate Division of the New Jersey Superior Court. Objective proof of this appears in the lengthy opinion of the Appellate Division which appears as Appendix C of Petitioners Writ. App. C at 3a-15a. The Appellate Division opinion painstakingly went over each and every argument made by Volkswagen. The due process claims were not addressed by the Appellate Division because they just weren't made at that time.

Only after losing the punitive damage issues did Volkswagen seek to raise the due process claims. It would be grossly unfair to respondents and the the courts of New Jersey to grant this Petition on issues that were not properly raised below.

### POINT II

### THE NEW JERSEY STANDARDS FOR PUNITIVE DAMAGES ARE EXTREMELY STRICT, AND NO DUE PROCESS VIOLATIONS OCCURRED AT THE TRIAL.

Again, the best place to start in evaluating Volkswagen's belated claims of due process violations is with the Appellate Division decision below. Petitioners' Appendix C at 3a-15a. That opinion recounts what it takes before a jury may award punitive damages. Generally, punitive damages are available where defendant's conduct is "especially egregious." Petitioners' Appendix C at 10a. More specifically, punitive damages are available only when a manufacturer is (1) aware of or culpably indifferent to an unnecessary risk of injury and (2) refuses to take steps to reduce the danger to an acceptable level. This standard can be met only by showing a deliberate act or omission with knowledge of

Petitioners are unable to cite a single case in which a court anywhere in the United States has held that the due process clause of the Constitution requires a clear and convincing standard. It is true that a small minority of states have chosen to establish a burden of proof at the "clear and convincing" level. This has been accomplished by legislation and by a handful of judicial decisions based on common law interpretations. Petitioners have cited all of these instances. Yet, the justice laboratories of the individual states seem to be the best place for that decision making. Again, not a single jurisdiction has indicated a "clear and convincing" standard is constitutionally mandated by the due process clause.

With regard to the contention that punitive damages are akin to a criminal conviction, this is absurd in light of the fact that Volkswagen was simply assessed civil monetary damages, still sells cars, and still claims nothing was ever wrong with their Audi 5000 cars. Audaciously, Volkswagen tries to hoodwink this Court by asserting that a post trial report of the National Highway Traffic Safety Administration found there was nothing wrong with the Audi 5000. In reality, that report precisely identified the pedal cluster problem proven at trial as the key culprit in the unintended acceleration phenomenon. It was Volkswagen's deliberate delay in addressing this problem which led to the punitive award. Investigative Report, Alleged Sudden Unwanted Acceleration, 1978-1986 Audi 5000 Passenger Cars Imported by Volkswagen of America, Inc., ODI Case No. C86-01 (Office of Defects Investigation Enforcement, National Highway Traffic Safety Administration, July, 1989) cited at Petitioners' brief, page 4.

## POINT III

## TRIAL FORMAT IS CERTAINLY A MATTER FOR THE STATE COURTS TO APPROPRIATELY DETERMINE, AND THE DECISION NOT TO BIFURCATE THE TRIAL DID NOT VIOLATE ANY DUE PROCESS RIGHTS OF THE PETITIONER.

Petitioners are again unable to cite a single case anywhere in the country where it has been held that the failure to bifurcate liability and compensatory damage issues from punitive damage

a high degree of probability of harm and reckless indifference to the consequences." Petitioners' Appendix C at 11a; Fischer v. Johns Manville Corp., 103 N.J. 643, 672-674 (1986).

The Appellate Division of the Superior Court of New Jersey below succinctly stated some of the facts leading to the punitive award. The Court said:

> The proofs were adequate to allow a jury to determine that Volkswagen knew long before the accident that dangerous sudden unwanted acceleration was caused, at least in part, by simultaneous actuation of brake and accelerator pedals, decided to blame driver error, even though Audi 5000 runaway incidents exceeded those of other Volkswagen marketed vehicles by a factor of 50 to 100. Creation of the product liaison group, a quasi-legal department developed to investigate the acceleration problem suggests that Volkswagen's remedial effort were not merely slow, as acknowledged by the trial judge's opinion, but primarily concerned with profits and legal problems rather than prompt correction of a serious product safety hazard.

Petitioners' Appendix C at 11a-12a

While Volkswagen never argued to the Appellate Division of the New Jersey Superior Court that a clear and convincing standard was necessary, Volkswagen did make numerous claims of error with respect to the judge's charge to the jury. Again, after a complete review of the charge, the Appellate Division found "that the charge, as a whole, clearly and correctly instructed the jury on all relevant principles of law pertinent to the case at bar." Petitioners' Appendix C at 15a.

It is of note that the size of the punitive damage award showed extreme restraint on the part of the jury. While compensatory damages in the case amounted to $14,000.00, the punitive damages were $100,000. There has never been a question raised in this case that the size of the award was inappropriate. Thus, the amount of punitive damages which has recently been a subject discussed by the U.S. Supreme Court is not present here.

issues is a violation of the due process clause. A few states have decided that bifurcation is appropriate. New Jersey, by legislation which took effect after the within matter was filed, has decided to bifurcate punitive damage issues from underlying liability and damage issues. N.J. Stat. Ann. 2A:58C-1 et. seq. (West 1987)

It is a disgrace that Petitioners would attempt to mislead the United States Supreme Court on the question of when the new statute guiding product liability trials in New Jersey went into effect. It is quite clear from reading the law that the Legislature intended that any procedural changes the law made would apply only to cases filed after July 22, 1987. N.J. Stat Ann. 2A:58C-1 et. seq. (West 1987). Obviously, that is how the trial and appellate courts of New Jersey interpreted the statute in this instance.

There is not a shred of evidence that the jury which unanimously awarded punitive damage below was confused or prejudiced against Volkswagen. The jury acted with restraint in terms of the monetary award, and as the Appellate Division Opinion makes plain, the jury was completely and adequately charged on the different proofs required to reach an award on compensatory damages and punitive damages.

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For these reasons, it is hoped that the Petition will be denied. While we had asked that the matter be submitted to the Court without a reply, the Court has requested us to respond. We hope we have not trespassed on the Court's time.

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vs.

GERMAINE GIBBS, AMY GIBBS, LORI
GIBBS and RAYMOND GIBBS,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

## REPLY MEMORANDUM

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## REPLY MEMORANDUM

This case presents substantial constitutional issues of national importance. Each day, defendants are faced with the threat of punitive damages awards processed without proper constitutional protections. In New Jersey, as in many other states, the courts have not confronted the serious constitutional ramifications involved in the award of punitive damages. This quasi-criminal aspect of the judicial system has proceeded unchecked and out of control.

Respondents first chose to oppose the Petition for a Writ of Certiorari by silence. Upon direction of this Court to file an Opposition Brief, respondents now choose to proceed to misstate the record. Neither tactic dispels the worthiness of this case for review. The plain fact is that the due process issues involving punitive damages were raised during trial and in the New Jersey appellate courts at all stages when petitioners were bound to do so. Although respondents predictably oppose the instant petition for certiorari, the method, subject matter and content of that opposition is factually indefensible. For these reasons, petitioners respectfully submit this reply memorandum pursuant to Sup. Ct. R. 22.5.

### I. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE TO THE IMPOSITION OF PUNITIVE DAMAGES AND THE NEED FOR THE USE OF A "CLEAR AND CONVINCING" BURDEN OF PROOF IN THE STATE COURTS BELOW

Contrary to respondents' empty assertions, petitioners Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. (hereinafter collectively referred to as "VWoA") did properly raise the issue of whether a "clear and convincing evidence" standard of proof is constitutionally necessary for an award of punitive damages in both the trial and appellate courts. For example, in support of petitioners' motion for partial summary judgment dismissing the punitive damages claim in the trial court, petitioners VWoA argued: "This court should adopt a

standard of clear and convincing proof of punitive damages liability in this case." *See* Brief in Support of Defendants Volkswagen of America and Bell Porsche-Audi, Inc.'s Motion for Partial Summary Judgment Dismissing Plaintiff's Punitive Damage Claim at 36-46. Petitioners also argued as part of this pre-trial motion that the "preponderence of the evidence" standard of proof was "unconstitutional as violative of the due process clause under the Fourteenth Amendment to the United States Constitution." *Id.* at 46. Moreover, petitioners specifically requested that the trial court utilize the more stringent "clear and convincing evidence" burden of proof as part of its charge to the jury. *See* Petition For a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, App. G at 38a (hereinafter referred to as "Petition for a Writ of Certiorari"). Respondents' attempt to ignore these plain record facts is frivolous at best.

Similarly, the issue of a "clear and convincing evidence" burden of proof was properly and clearly raised in the Superior Court of New Jersey, Appellate Division. It must be remembered that the trial court had set aside the punitive award. When the Appellate Division reversed the trial court's judgment notwithstanding the verdict on the issue of punitive damages, VWoA, faced with an Appellate Division ruling imposing, *inter alia,* a punitive damages judgment against it *for the very first time in this case,* promptly called the attention of the appellate court to the major constitutional tensions caused by the imposition of punitive damages under the circumstances which prevailed at trial. In fact, contrary to respondents' claim in their Brief in Opposition to Writ of Certiorari,[1] VWoA argued before the Appellate Division:

> This Court must adopt a clear and convincing standard of proof for punitive damages cases; the use of a lesser

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[1] Respondents blatantly assert that petitioners "never raised either of the two due process claims they now make in their petition". Brief in Opposition to Writ of Certiorari to the Superior Court of New Jersey, Appellate Division at 1. The record facts illustrate just the opposite.

standard by the trial court together with vague jury instructions and unlimited jury discretion, deprived defendants of due process of law.

*See* Brief of Defendants-Respondents Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. in Support of Motion for Reconsideration of Opinion of February 9, 1989 at 6. The same constitutional argument was presented to the New Jersey Supreme Court. *See* Petition for Certification to the Appellate Division by Defendants Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. at 7-9. Respondents conveniently and selectively choose not to challenge that uncontroverted fact.

The issue of whether a punitive damages award violates a defendant's due process rights under the Fourteenth Amendment of the United States Constitution where the jury is charged to apply only the minimal "preponderance of the evidence" burden of proof has been clearly and succinctly raised at every stage in the state courts below. That these courts have not addressed and considered the important federal constitutional issues only emphasizes that this Court must intervene in order to protect defendants faced with punitive damages liability imposed by a judicial system which has no mandated procedural safeguards or constitutional guidelines.

## II. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE REGARDING BIFURCATION AT TRIAL OF THE PUNITIVE ASPECTS OF THE CASE IN THE STATE COURTS BELOW.

In the same misleading way respondents argued that the "clear and convincing evidence" issue was not properly raised in the state courts below, they also contend that VWoA failed to raise the federal due process challenge to the trial court's failure to bifurcate the proceedings.[2] Once again, respondents totally ignore the record below.

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2. Respondents also argue: "It is a disgrace that petitioners would attempt to mislead the United States Supreme Court on the question of when the new statute guiding product liability trials went into effect". Brief in Opposition to Writ of Certiorari to the Superior Court

VWoA specifically requested that the trial court bifurcate the liability aspects of the trial from the punitive damages claim. *See* Petition for a Writ of Certiorari, App. D at 20a-21a. This argument was then explicitly presented again to the New Jersey Superior Court, Appellate Division, in the Brief of Defendants-Respondents Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. in Support of Motion for Reconsideration of Opinion of February 8, 1989 at 4. The bifurcation issue was similarly raised in the Supreme Court of New Jersey. *See* Petition for Certification to the Appellate Division by Defendants Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. at 9-11. Respondents' deliberate tactic of ignoring these submissions to the New Jersey state courts, by trying to improperly focus this Court's attention solely on the opinion of the New Jersey Appellate Division violates every covenant of good faith and fair dealing. That opinion first reinstated a punitive award that the trial court had set aside.

Petitioners VWoA thus properly preserved the bifurcation issue below by raising it at each level of the state court system. It is respectfully submitted that this Court should now finally review the compelling constitutional issues that the state courts refuse to address.

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of New Jersey, Appellate Division at 4. It is respectfully submitted that the attempt to mislead is made, not by petitioners, but by respondents Gibbs. N.J. Stat. Ann. 2A:58C-5(b) (West 1987), which provides for bifurcation of punitive damages proceedings in New Jersey was to "take effect immediately", except where it imposes new rules respecting burdens of proof or the imposition of liability. *Id.* The dictate of the purely procedural portion of the statute regarding bifurcation thus applied to the trial of this case, which began seven months *after* the statute became effective. In addition, the New Jersey Supreme Court has held that procedural statutes and rules of court are to be given retrospective application. *Feuchtbaum v. Constantine*, 59 N.J. 167, 172 (1971). Petitioners were thus improperly and unconstitutionally deprived of the legislatively mandated procedural protection of bifurcation. The apparent willingness of the state courts to overlook this cardinal safeguard, even when provided by statute, enhances the worthiness of this case for review by this Court from the perspective of due process.

## III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REMEDY THE CONSTITUTIONALLY INFIRM SYSTEM OF DETERMINING PUNITIVE DAMAGES LIABILITY.

This case presents not only constitutional issues of great moment and significance, but also two reasonably precise mechanisms by which due process may be effectively safeguarded. Petitioners were deprived of due process of law under the United States Constitution as a result of the New Jersey state courts' refusal to utilize a "clear and convincing evidence" burden of proof, and because petitioners were arbitrarily deprived of the additional procedural protection of bifurcation at trial.

Contrary to respondents' contentions, the decision whether to afford defendants in punitive damages cases the valuable procedural safeguards of trial bifurcation, and the use of the more stringent "clear and convincing" burden of proof cannot and should not be left to the unguided discretion of individual state legislatures or courts. The result in this case amply illustrates what happens when mandates of due process are ignored. Application of an alarmingly arbitrary quasi-criminal system of justice on a daily basis in a non-uniform, standardless manner across the nation warrants review by this Court to mandate appropriate constitutional protections. This case presents two explicit means by which defendants in punitive damages cases will be spared quasi-criminal penalties imposed by unguided jurors operating within a system which fails to focus the jury's attention upon the gravity of their task. It is repectfully submitted that this case is both a proper vehicle and properly positioned for a declaration that punitive damages must be awarded only under the strictest of constitutionally firm procedural guidelines.

## CONCLUSION

For the reasons set forth herein, and in VWoA's Petition for a Writ of Certiorari, it is respectfully submitted that the time has come for this Court to resolve these substantial issues. It is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

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